Supreme Court, U. S.
FILED
FEB 13 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1252

STATE OF CALIFORNIA, *et al.*,
Petitioners,

vs.

SIERRA CLUB, *et al.*,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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OPINIONS BELOW

The decision of the U.S. Court of Appeals, which is not yet officially reported, is set forth in the Appendix. App. 2-65. The decision of the district court, which is officially reported at 400 F.Supp. 610 (N.D. Cal. 1975), is set forth in the Supplemental Appendix.

JURISDICTION

The decision of the U.S. Court of Appeals was rendered on October 31, 1979. A petition for rehearing was filed by the plaintiffs on November 21, 1979, and was denied on January 17, 1980. A petition for writ of certiorari is due on or before April 16, 1980. This Court has jurisdiction under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

(1) Does the Rivers and Harbors Act of 1899 authorize the Army Corps of Engineers to control water diversions from a state reclamation project where the state has authorized the diversions under its water rights laws, where the diversions are part of a state water allocation scheme, and where the diversions may have no effect on navigation?

(2) Does the Rivers and Harbors Act of 1899, which is applicable to physical works built by a "person" or "corporation," apply to reclamation projects owned and operated by a state?

(3) Does the Rivers and Harbors Act of 1899 authorize the Army Corps of Engineers to control water diversions from a federal reclamation project built and operated under the Reclamation Act of 1902?

FEDERAL LAWS INVOLVED

This case involves an interpretation of sections 9 and 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401, 403, which are set forth in the Appendix. App. 1.

STATEMENT OF THE CASE

1. Facts of the Case

In response to an initiative approved by the California electorate in 1960, California built a massive reclamation project that transports water from rural mountainous areas in the northern part of the State to metropolitan and agricultural areas in the central and southern parts of the State. The project, known as the State Water Project (SWP), is owned by the State and operated by a State agency, the State Department of Water Resources (SDWR). The SDWR has entered into 31 water supply contracts with irrigation and municipal water districts in central and southern California. The contracts provide for

ultimate delivery of approximately 4.2 million acre-feet of water annually from the SWP. The contracting water districts have entered into other contracts with local agricultural, industrial, and domestic users on the assumption that SWP water will be available for local needs. The SWP presently provides a water supply for approximately 15 million people and 500,000 acres of prime agricultural land. App. 8-9.

The main component of the SWP is a large dam near Oroville on the Feather River, a tributary of the Sacramento River. The dam releases water that eventually reaches the Sacramento-San Joaquin Delta, a maze of interlocking channels which form the confluence of the Sacramento and San Joaquin Rivers. The Delta drains into San Francisco Bay and the Pacific Ocean. The SWP water is exported from the Delta by a State pumping facility located at the south end of the Delta. The exported water flows through a State aqueduct to the contracting water districts in central and southern California. App. 8-9.

Pursuant to the Reclamation Act of 1902, the federal government built its own reclamation project, the Central Valley Project (CVP), in California. The CVP, the largest reclamation project in the nation, includes several dams on the upper Sacramento and San Joaquin Rivers. The dams release waters that flow downstream to the Delta, where the CVP water is commingled with SWP water. CVP waters are exported from the Delta by a federal pumping facility located at the south end of the Delta, and flow through a federal aqueduct to contracting water districts in central California. The CVP is operated by the U.S. Bureau of Reclamation (USBR).[1] See generally *United States v.*

1. The USBR was recently renamed the U.S. Water and Power Resources Service. For purposes of this petition, we will continue to refer to the agency as the USBR.

Gerlach Live Stock Co., 339 U.S. 725, 727-735 (1950); *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275, 280-284 (1958).

A major problem of California's water supply system is that the Delta's waters are perennially threatened by intrusion of ocean salt waters. The intruding salt waters pose a threat to valuable economic and environmental interests in the Delta; the Delta sustains a rich agricultural economy, and is the source of unusual species of fish and waterfowl. The intruding salt waters also threaten to degrade the quality of SWP and CVP waters exported from the Delta to contracting water districts in central and southern California. The most effective way to prevent such salinity intrusion is to flush out the salt waters by release of vast quantities of fresh waters from the upstream dams and reservoirs of the SWP and CVP. The more water that is used for flushing purposes, however, the less water is available for export to the contracting water districts. A conflict thus exists between Delta water needs and the water needs of users in central and southern California. The allocation of water between these needs requires a careful balancing of economic, domestic and environmental interests in northern, central, and southern California. The allocation of such water will have a major impact upon California's economic growth and environmental quality. See Note, "Delta Water Rights Decision," 2 *Ecol. L. Quar.* 733 (1973).

Under California law, the authority to allocate water among competing needs rests with the State Water Resources Control Board (SWRCB). The SWRCB has authority to grant appropriative water rights, and to impose conditions on the rights to the extent necessary to insure the "reasonable and beneficial use" of water and to protect the "public interest." Cal. Water Code §§ 275, 1201,

1225, 1250-1258, 1375-1415. The SDWR and USBR have applied to the SWRCB for permits to appropriate water from the Delta water supply for use in the SWP and CVP, respectively. After lengthy hearings, the SWRCB granted appropriative permits subject to conditions that the projects release water from upstream storage or discontinue water exports from the Delta to the extent necessary to meet Delta water quality standards set by the SWRCB. The SWRCB has periodically modified its Delta water quality standards on the basis of economic, domestic and environmental needs of both Delta and non-Delta interests. The SWRCB recently issued a landmark decision, Decision 1485, which generally provides that, as a condition to SWP and CVP water exports from the Delta, (1) Delta consumptive uses must receive at least the same water quality which they would have received if the SWP and CVP had not been built, and (2) Delta environmental needs must receive historical levels of protection. This administrative decision thus results in a major allocation of water among northern, central, and southern California interests. Decision 1485, State Wat. Res. Cont. Bd. (Aug. 1978).[2]

To improve the quality of project waters exported from the Delta, the State of California has proposed to build a 42-mile canal around the eastern margin of the Delta that will carry fresh water from the Sacramento River to the SWP and CVP pumping plants in the south Delta. This

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2. Several lawsuits have been filed, and are now pending, against the SWRCB by Delta and non-Delta interests, each claiming that Decision 1485 allocates insufficient water to each's own needs. The plaintiff in the instant case, the Sierra Club, participated in the hearings before the SWRCB, but did not file a lawsuit challenging the allocation system in Decision 1485. Thus, to the extent that the plaintiffs seek to protect the Delta's environment, they have a remedy under State law which they have failed to utilize.

A copy of Decision 1485 has been lodged with the Clerk of this Court.

proposed canal, known as the Peripheral Canal, would also release fresh water into the Delta at selected intervals for the protection of Delta water quality. Although the State has not formally authorized construction of the canal, it has expended approximately $10 million towards its construction. The federal government has participated in the planning for the canal, but Congress has not yet authorized federal participation in its construction. App. 9.

2. Nature of the Controversy

Prior to the issuance of Decision 1485, the plaintiffs initiated this action against the federal officials who operate the CVP, the State officials who operate the SWP, and the State of California. The plaintiffs alleged that (1) sections 9 and 10 of the Rivers and Harbors Act of 1899 require that the Army Corps of Engineers ("Corps") issue a permit as a prerequisite to SWP and CVP water exports from the Delta to the contracting water districts, and as a prerequisite to construction of the Peripheral Canal, and (2) the Corps cannot issue such a permit until it has prepared and issued an environmental impact statement pursuant to the National Environmental Policy Act, 42 U.S.C. §§ 4321-4347. App. 4-7.

The defendants alleged that (1) the Rivers and Harbors Act of 1899 does not authorize a private right of action, (2) the plaintiffs lack standing to maintain their action, (3) sections 9 and 10 of the 1899 Act are not applicable to SWP and CVP water exports from the Delta, and (4) the requirements of the sections have been met if they are applicable here. In addition, the federal defendants alleged that section 10 is not applicable to CVP water diversions because the diversion works have been expressly authorized by Congress. App. 5-6.

3. The Case Below

Both the district court and the Court of Appeals rejected the defendants' main arguments, ruling that (1) the Rivers and Harbors Act of 1899 provides for a private right of action, (2) the plaintiffs have standing to maintain their action, (3) sections 9 and 10 of the 1899 Act are applicable to SWP and CVP water exports from the Delta, and (4) the requirements of the sections have not been met here.[3] However, the Court of Appeals, reversing the district court, upheld the federal defendants' argument that section 10 is not applicable to CVP water diversions because the diversion works have been specifically authorized by Congress. App. 41-53.

The Court of Appeals, affirming the district court, enjoined the State defendants from exporting water from the

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3. The Court of Appeals remanded the case to the district court for determination of whether the State pumping plant is exempt from the permit requirements of the 1899 Act because of a "grandfather clause" provision in the Corps' regulations. App. 56-57. Even though the lower judgment is not yet final, the urgency of the jurisdictional issue warrants this Court's immediate review of the issues herein. Even if it is held in the remanded proceeding that the State's existing pumping plant is exempt from Corps approval because of the "grandfather clause" provision, the exemption would apparently not extend to plant additions that enlarge plant capacity and thus result in increased water diversions; the State plans to increase the plant capacity, and hence increase the rate of diversions, by 60% in 1980. App. 8.

Further, the "grandfather clause" provision is not applicable to the State's proposed construction of the Peripheral Canal, and thus will have no effect on the court's determination that the State must obtain Corps approval prior to commencing construction of the canal. A bill is now pending in the California Legislature that would authorize construction of the canal, and that makes no provision for Corps approval. S.B. 200, Cal. Legislature (Ayala). Further, the State has already expended approximately $10 million for preliminary work on the canal, and should know whether the canal is subject to Corps approval prior to expending additional sums. For these reasons, it is important that the meaning of sections 9 and 10 be finally resolved as soon as possible.

Delta or commencing construction of the Peripheral Canal prior to obtaining a permit from the Corps. App. 58-59. The court stayed the injunction with respect to water exports until the Corps issues a permit, but did not stay the injunction with respect to construction of the Peripheral Canal. App. 58-59. The State of California and the State defendants now file their petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

I. This Case Presents Important Federal Issues That Deserve the Attention of This Court.

This case raises fundamental issues of federalism that have never been addressed by this Court, or by any federal appellate court prior to this case. The primary issue is whether the Corps has authority to regulate water diversions from a state reclamation project where the state has authorized the diversions under its water rights laws as part of a state water allocation scheme, and where the diversions may have no effect on navigation.

This issue involves a conflict between congressional laws that, on their surface, might be construed as vesting the Corps and the western states with control over the same subject matter. On the one hand, Congress, by enacting the Rivers and Harbors Act of 1899, provided the Corps with broad control over structures that affect navigable waters. The Court of Appeals construed this Act as authorizing the Corps to control water diversions from a state reclamation project that are authorized by the state under its water rights laws, and that are part of a state scheme to allocate water among different water users and interests. The court held that the Corps has such control even though the diversions may not actually affect navigation. App. 28-29. On the other hand, Congress has granted broad

power to the western states, by a series of enactments dating back to the last century, to control allocation of water among local interests; this power includes the power to provide for water diversions to the local interests. Thus, this case presents an apparent conflict between congressional grants of authority to the Corps and the western states over the control and allocation of water resources.

This issue has a major impact on the growth and development of the western states. Because of the arid nature of most western lands, water is necessary to make the lands habitable and productive; water is thus the key to the West's economic growth. To develop and conserve their sparse water supply, all western states have developed administrative water rights systems which provide for allocation of water among local agricultural and urban interests. See, *e.g., United States v. Gerlach Live Stock Co.,* 339 U.S. 725, 742-750 (1950); 1 Hutchins, *Water Rights Law in the Nineteen Western States,* 302 (1974). Under these state systems, the water allocations are based on the need to provide for the most "reasonable and beneficial use" of water as determined by each state. *Id.* The Court of Appeals' decision, however, allows the Corps to override the state water allocations, even where navigation is not affected by the allocations. The court's decision thus diminishes the states' authority, and enlarges the Corps' authority, over the water resources that are vital to western growth and development. The decision runs against the grain of this Court's recent decisions that recognize the western states as having broad control of their unappropriated waters even where competing federal interests are involved. See *California v. United States,* 438 U.S. 645 (1978); *United States v. New Mexico,* 438 U.S. 696 (1978).

The Court of Appeals' decision will have a singularly large impact in California. As noted above, the State and

the federal government have built large reclamation projects that deliver millions of acre-feet of water annually from northern California to central and southern California. The State, through the SWRCB, has authorized the delivery of the water subject to conditions for protection of the Delta in northern California. Water districts in central and southern California have signed contracts for the delivery of the water, and have made plans for its use. The lower decision, however, allows the Corps to prevent the delivery of the water if, in the Corps' judgment, the Delta is not adequately protected. The decision thus allows the Corps to override a comprehensive state scheme to allocate water among northern, central, and southern California interests.

As will be explained more fully in this petition, we assert only that the western states, in allocating water under their water rights laws, are not subject to the Corps' authority under the Rivers and Harbors Act of 1899. We do not assert, however, that the western states are free of the federal navigation power. In our view, the federal government has inherent power, independently of the Corps' authority under the 1899 Act, to restrain state water allocations that may substantially impair navigation and commerce. As we explain below, this federal power requires that the navigational impact of the state allocations be measured against (1) the state's interest in making the allocations and (2) the availability of alternative means by which the state interest can be served. Since the federal government has an independent remedy to restrain state allocations that threaten navigation and commerce, there is no federal interest that compels the conclusion that the Corps has such a remedy under the Rivers and Harbors Act of 1899. In short, the federal navigation interest is neutral in this case.

Because the federal navigation interest is neutral, this case presents no contest between the State of California and the United States. In the proceeding below, the United States fully agreed with our views, stating that it was "beyond both Congress' intent in enacting section 10 and the Corps' present capabilities" for the Corps "to take over traditional state administration of appropriative water rights." U.S. Reply Br., 7. The Corps' authority in this case is asserted by a private party, not by the United States. The State and the United States are thus in apparent accord with respect to the relationship of their powers, which strengthens our view that the lower decision—which alters that relationship—should be reviewed by this Court.

II. The Court of Appeals, by Holding That the Army Corps of Engineers Has Control of Water Diversions That Are Part of a State Water Allocation Scheme, Has Improperly Resolved the Conflict Between Federal Laws Involved Here.

A. THE CORPS' POWERS UNDER THE RIVERS AND HARBORS ACT OF 1899.

Section 10 of the Rivers and Harbors Act of 1899 contains three clauses.[4] The first clause prohibits "any obstruc-

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4. Section 10 provides:

"The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structure in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same." 33 U.S.C. § 403.

tion not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States . . . ." 33 U.S.C. § 403. The second clause prohibits the erection of any structure in navigable waters except on plans recommended by the Corps and approved by the Secretary of the Army. *Id.* The third clause, which is the most far-reaching, makes it unlawful to *"alter or modify"* the "course, location, *condition, or capacity*" of any navigable channel except pursuant to the Corps' recommendation and approval by the Secretary of the Army. *Id.* (Emphasis added.)

The Court of Appeals broadly interpreted the Corps' powers under section 10. In the major part of its decision, the court ruled that the section authorizes the Corps to control water diversions even where the diversions are authorized by a state under its water rights laws, and are part of a general water allocation scheme established by the state. App. 26-41. Moreover, the court, overruling the district court, ruled that the Corps can control water diversions even where navigation is not affected. According to the Court of Appeals, the third clause of section 10—which requires Corps approval of any attempt to "alter or modify" the "condition or capacity" of navigable waters—is applicable even if the first clause—which prohibits any "obstruction" to navigation—is not strictly applicable; any modification or alteration of the condition or capacity of navigable waters is *presumed* to obstruct navigable capacity, even if *actual* navigable capacity is not affected. App. 28-29, 31, 41-42.[5]

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5. The district court held that Corps approval is required only if the water diversions result in an "obstruction" to navigation within the meaning of the first clause, and that the water diversions in this case resulted in such an obstruction. App. 27-28. The

The Court of Appeals thus held that the Corps can control any water diversion authorized by a state under its water rights laws, even if the diversion affects the *condition* rather than the *navigability* of the waters. State water rights laws commonly result in water diversions that affect the *condition* of the water from which the diversions are made. The lower decision thus allows the Corps to control most water appropriations authorized under state water rights laws. Moreover, since the Corps can exercise such control even if the navigability of the water is unaffected, the Corps can control state water appropriations even where federal navigation interests are not involved.

The court, construing the Corps' powers even more broadly, ruled that the Corps must consider the environment consequences of the diversions, and must prepare an environmental impact statement prior to authorizing any diversion that may have a substantially adverse effect on the environment. App. 18 n. 13, 25. Indeed, the court ruled that the Corps can prevent water diversions on strictly environmental rather than navigational grounds. *Id.* It thus allowed the Corps' environmental judgment to override that of the state regardless of the navigational impacts of the diversions.

We do not deny that the Corps has broad power, even to the point of considering non-navigation factors, in determining whether to approve water diversions that are *not* authorized pursuant to state water rights laws. Indeed, we encourage the broadest possible interpretation of the Corps' authority in areas that are not otherwise subject to federal

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Court of Appeals ruled, however, that the water diversions resulted in a modification or alteration of the "condition or capacity" of navigable waters within the meaning of the third clause, and thus that it was unnecessary to determine whether the diversions resulted in an "obstruction" within the meaning of the first clause. App. 28-29.

or state governmental regulation. We contend only that the Corps' authority under the Rivers and Harbors Act of 1899 does not extend to water diversions that are authorized as part of a state water allocation scheme. Congress has provided for state control of water diversions in this context, as we shall now see.

B. STATE CONTROL OF WATER ALLOCATIONS.

Because of the importance of water to the West's economic growth and development, Congress has long established a policy of allowing the western states to allocate water among local economic interests. This policy, for example, finds expression in the "equal footing" doctrine. Under this doctrine, the western states acquired control of their navigable waters at the time of their admission to statehood subject to paramount federal powers over navigation. See, *e.g., California v. United States,* 438 U.S. 645, 654-655 (1978); *Pollard's Lessee v. Hagan,* 44 U.S. (3 How.) 212, 223-224 (1845).

This congressional policy was furthered in the Mining Acts of 1866 and 1870, 43 U.S.C. § 661, and the Desert Land Act of 1877, 19 Stat. 377. These acts generally authorize the western states to control the appropriation of their surplus waters subject to federal power over federal lands and over navigation. See *California v. United States, supra* at 656-658; *Ickes v. Fox,* 300 U.S. 82, 95 (1937); *Broder v. Water Co.,* 101 U.S. 274 (1879); *Jennison v. Kirk,* 98 U.S. 453, 459-461 (1879); *California Oregon Power Co. v. Beaver Portland Cement Co.,* 295 U.S. 142, 153-157 (1935).

Congress instituted its own reclamation program for the West by enacting the Reclamation Act of 1902, 43 U.S.C. §§ 371 *et seq.* Section 8 of the Act, *id.* at §§ 372, 383, reaffirms the states' "control" of "appropriation, use, or distribution"

of water, and provides that the federal government "shall proceed in conformity with" such laws in carrying out the federal reclamation program. This Court recently reaffirmed the states' broad authority under the Act, overruling several of its own prior decisions that had narrowly interpreted the states' authority. *California v. United States, supra.* It is both ironic and anomalous that, although this Court now recognizes the states as having broad control of water developed by *federal* reclamation projects, the Court of Appeals' decision provides the federal government—through the Corps—with broad control of water developed by *state* reclamation projects.

Congress has continued to recognize state water laws by legislation enacted in the modern era. For instance, the Federal Water Supply Act of 1958, 43 U.S.C. § 390(b), which authorizes federal construction of navigation and flood control works, provides:

> "It is declared to be the policy of the Congress to recognize the primary responsibilities of the States and local interests in developing water supplies for domestic, municipal, industrial, and other purposes and that the Federal Government should participate and cooperate with States and local interests in developing such water supplies in connection with the construction, maintenance, and operation of Federal navigation, flood control, irrigation, or multiple purpose projects."

A clear example of how Congress has deferred to state laws even where the Corps' navigation powers are concerned, is found in the Clean Water Act, 33 U.S.C. §§ 1251-1376. Section 13 of the Rivers and Harbors Act of 1899 authorized the Corps to control waste discharges into

navigable waters. 33 U.S.C. § 407; *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960). In the 1972 amendments to the Clean Water Act, the Corps' authority under section 13 was transferred to the Administrator of the Environmental Protection Agency. 33 U.S.C. § 1342(a)(5). Sections 101(g) and 510(2) of the Clean Water Act, however, make clear that the Administrator's authority to control waste discharges does not extend to state water allocations. *Id.* at §§ 1251(g), 1370(2).[6] In short, Congress transferred part of the Corps' authority under the Rivers and Harbors Act of 1899 to the Administrator, but made clear that the Administrator's authority is subordinate to state water allocations. The clear implication is that the authority retained by the Corps under the 1899 Act is also subordinate to state water allocations.

This Court has repeatedly upheld and reaffirmed the congressional policy to defer to water allocation schemes established under state water rights laws. It has noted that federal laws cannot "override state laws in respect to the general subject of reclamation." *Kansas v. Colorado,* 206 U.S. 46, 92 (1907). It recently commented that, "except where the reserved rights or navigation servitude of the United States are involved, the State has total authority over its internal waters." *California v. United States,* 438 U.S. 645, 662 (1978). It recently observed that, "because of historic congressional deference to state water rights laws, Congress presumptively means to defer unless it specifically provides otherwise." *United States v. New Mexico,* 438 U.S. 696, 702 (1978). These decisions make clear that,

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6. Section 101(g) provides:
"It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act." *Id.* at § 1251(g).

except where Congress expressly provides otherwise, state law controls the allocation of water in the West.

Pursuant to this historic congressional policy, the western states have developed administrative water rights systems that provide the basis for allocating water among competing local interests. Under California law, for example, any person who seeks to appropriate water must apply to the SWRCB for an appropriative permit. Cal. Water Code §§ 1201, 1225, 1250-1258, 1375-1415. The SWRCB, after conducting a public hearing, either grants or denies the application. *Id.* If it grants the application, it can attach conditions to the permit to the extent necessary to protect the "reasonable and beneficial use" of water and the "public interest." Cal. Const., Art. X, § 2; Cal. Water Code §§ 1201, 1240, 1375. Under this authority, as noted earlier, the SWRCB has authorized water diversions from the Delta for the purpose of providing a water supply to agricultural and urban interests in central and southern California, subject to conditions to protect Delta water quality. The SWRCB decision results in an allocation of water among northern, central, and southern California interests. The Court of Appeals' decision, by authorizing the Corps to control the diversions, allows the Corps to override a comprehensive water allocation scheme established under state law. It conflicts with this Court's decisions that recognize the western states as having primary control of their unappropriated waters.

Viewed from another perspective, the lower decision allows the Corps to invade an area that is within traditional state concern. The western states have traditionally controlled water allocations, and have acquired ample expertise in this area. Conversely, the Corps has not traditionally controlled water allocations, and has no particular expertise

in this area. In light of the historic congressional deference to state water laws, it is not likely that Congress meant for the Corps to assume a role that has historically been assumed by the states.

Indeed, the very breadth of the Corps' authority under the 1899 Act militates against the conclusion that the Corps can control state water allocations. As noted earlier, the lower decision allows the Corps to control water diversions even where navigation is not affected. The Corps thus has authority, under the lower decision, to override state water allocations that do not affect navigation in any way. It is not likely that Congress meant to vest the Corps with broad authority over water allocations that are subject to traditional state control, even in instances where federal navigation concerns are not involved.

Nothing in the legislative history of the Rivers and Harbors Act of 1899 suggests that Congress meant for the Corps to have such broad authority. The only example of the kind of conduct regulated by the Act, as frequently cited during the congressional debates, was the construction of a "bridge" by a "railroad company" or other "corporation" over navigable waters. 21 Cong. Rec. 8603-8604, 8690 (Sen. Vest), 8604 (Sen. Gray), 8605 (Sen. Dolph), 8606 (Sen. Hoar), 8606 (Sen. Gray), 8606 (Sen. Edmunds), 8990 (Sen. Carlisle.)[7] It is thus clear that Congress did not have a state water allocation scheme, such as that involved here, in mind when it enacted the 1899 Act. The Court of Appeals made no reference to this revealing legislative history.

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7. The cited references are to the legislative history of the Rivers and Harbors Act of 1890, 26 Stat. 426, 454. The Rivers and Harbors Act of 1899, which amended the 1890 Act, made "no essential changes" in the earlier Act. *United States v. Republic Steel Corp.*, 362 U.S. 482, 486 (1960).

In summary, there is an apparent conflict between the congressionally-delegated powers of the western states and the Corps over water allocations that are intended to serve local uses. The Court of Appeals concluded simply that, because the Rivers and Harbors Act of 1899 is literally applicable to water diversions that are otherwise subject to state control, the 1899 Act overrides the states' authority to control the diversions. App. 37-38. This simplistic analysis fails to take into account the broad authority which Congress has granted the western states over their unappropriated waters. It fails to provide a balanced accommodation of federal and state interests that is the hallmark of this Court's recent decisions in matters involving the interrelationship of federal and state power over water resources. See *California v. United States,* 438 U.S. 645 (1978); *United States v. New Mexico,* 438 U.S. 696 (1978); *cf. National League of Cities v. Usery,* 426 U.S. 833 (1976).

C. FEDERAL NAVIGATION POWER.

The Court of Appeals' decision largely rests on the conclusion that:

> "While states undeniably possess broad power to regulate their own navigable waters for the general welfare, the power clearly is, and should be, subordinate to the federal navigational power unless Congress expressly defers to the state authority in the context of a specific statute." App. 40.

The court has misconceived the nature of the issue presented here. This case does not raise any question concerning the supremacy of the federal navigation power over state law. This Court has repeatedly noted that the western states' control of their waters is subject to the paramount federal power to control navigation. See *California Oregon*

Power Co. v. Beaver Portland Cement Co., 295 U.S. 142, 159 (1935); *California v. United States*, 438 U.S. 645, 662 (1978). Congress thus has constitutional power to override state laws that may impair navigation and commerce. We do not contend otherwise. This case thus presents no clash between the federal navigation power and state law. It presents the more limited question whether the Corps, under the Rivers and Harbors Act of 1899, has power to control state water allocations that may or may not affect federal navigation interests.

Our view, that the Corps lacks power to control state water allocations, is supported by the fact that such control is not necessary to protect federal navigation interests. In our view, the federal government has inherent power to protect navigation, and thus to restrain state water allocations that may impair navigation. This Court has frequently suggested that the federal government has inherent power to protect navigation. See *Sanitary District v. United States*, 266 U.S. 405, 426 (1925); *United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690, 703-704, 706-707 (1899); *United States v. Republic Steel Corp.*, 362 U.S. 482, 492 (1960); *id.* at 493 (Frankfurter, J., dissenting).[8]

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8. In the *Sanitary District* case, this Court, describing the scope of the federal navigation power, stated:

> "Where the national importance is imminent and direct even where Congress has been silent the States may not act at all." 266 U.S. at 426.

In the *Rio Grande* case, this Court stated:

> "To hold that Congress, by these acts [principally the Mining Acts of 1866 and 1870 and the Desert Land Act of 1877], meant to confer upon any State the right to appropriate all the waters of the tributary streams which unite into a navigable watercourse, and so destroy the navigability of that watercourse in derogation of the interests of all the people of the United States, is a construction which cannot be tolerated." 174 U.S. at 706.

This inherent federal power exists independently of the Corps' authority under the Rivers and Harbors Act of 1899. Accordingly, the federal government can restrain state water allocations that substantially impair navigation even if the allocations are beyond the purview of the 1899 Act.[9]

The federal navigation power flows from the federal power to control interstate commerce. See, *e.g., United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690 (1899). This Court, in its decisions construing the federal commerce power, has pointed the way to a proper resolution of the issues here. The Court has long departed from the view that state action is unlawful simply because it burdens interstate commerce in some way. Rather, it adopts a balancing approach which considers the impact of the state action upon interstate commerce, the nature of the state interest, and the availability of alternative means by which the state interest can be served. See, *e.g., Dean Milk Co. v. Madison, supra.* The same approach should follow when the federal government seeks to restrain state water allocations that may affect navigation and commerce. That is, the Court should adopt a balancing test which considers the impact of the allocations on navigation, the nature of the state interest, and the availability of alternative methods by which the state interest can be served. This suggested approach protects both federal and state interests in our federal system, for it balances the state's interest in allocating water against the navigational impact of the

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9. In *Williamette Iron Bridge Co. v Hatch*, 125 U.S. 1 (1888), this Court held that a private party cannot bring an action to prevent an obstruction to navigation, on grounds that there is no federal common law which authorizes such an action. Since that action was brought by a private party, the Court's decision is not inconsistent with our argument that the federal government has the inherent right to bring such an action. The case is thus distinguishable here.

allocations. This approach is more harmonious with our federal scheme than the simplistic approach adopted by the Court of Appeals, which would allow the Corps to prevent *any* diversions that affect the "condition" of navigable waters, even if the diversions are vital to a state water allocation plan and have no effect on navigation.

It is thus clear that a state water allocation scheme, even if beyond the scope of the Rivers and Harbors Act of 1899, is not beyond the scope of the federal navigation power. Since the federal government has inherent power to restrain state water allocations that unduly affect navigation and commerce, there is no danger that state allocations will impair important federal interests. If we are wrong, and the federal government somehow lacks authority to restrain such state allocations, Congress can easily remedy the situation by enacting the necessary legislation; as noted above, there is no question that Congress can constitutionally override state law by enacting legislation to protect navigation and commerce. In any event, the federal interest in protecting navigation can be achieved without subjecting state water allocations to the constraints of the Rivers and Harbors Act of 1899. The federal navigation interest is neutral here, as we noted earlier.

III. The Rivers and Harbors Act of 1899 Does Not Apply to Water Diversions from Projects Owned and Operated by the States.

We have seen that the Rivers and Harbors Act of 1899 does not authorize the Corps to control water diversions that are authorized by a state under its water rights laws, and that are part of a state water allocation scheme. Independently of that grounds, we assert that the Act does not apply to water diversions from reclamation projects owned and operated by the states.

Under section 12 of the Rivers and Harbors Act of 1899, any "person" or "corporation" who violates the Act is subject to injunctive relief or penal sanctions. 33 U.S.C. § 406. The Act thus apparently applies only to water diversions of a "person" or "corporation." This Court has held that a state is not a "person" or "corporation" within the meaning of a federal law unless Congress clearly indicates otherwise or unless federal interests can only be otherwise served. See *Parker v. Brown,* 317 U.S. 341 (1943). This conclusion rests on the principle that, because of the states' vital role in our federal system, Congress does not normally subject the states to the same constraints which it applies to others. In *Parker v. Brown, supra,* for example, this Court held that the federal antitrust laws, which are applicable to "persons" and "corporations," are not applicable to the states; it noted that nothing in the federal antitrust laws or their legislative history suggests that Congress meant to inhibit state activity. *Id.* at 351.

Similarly, nothing in the Rivers and Harbors Act of 1899 or its legislative history suggests that Congress meant to inhibit state activity. As noted earlier, the legislative history indicates that Congress was concerned only with private activity—such as that of a "railroad company" or other "corporation"—in building a "bridge" or other structure that obstructs navigation.[12] Moreover, federal interests are fully served even if the states are not subject to the Rivers and Harbors Act of 1899; as noted earlier, the

12. The legislative history indicates that Congress meant to regulate private activity that is otherwise subject to state regulation, in instances where the state is acting pursuant to its power to build a transportation system that includes roads and bridges. 21 Cong. Rec. 8990 (1890) (Sen. Carlisle). This legislative history does not bear on our contention that Congress did not mean to regulate private activity that results in water allocations that are authorized and controlled under state water rights laws.

federal government has inherent power to restrain state actions that impair navigation and commerce. Accordingly, the Rivers and Harbors Act of 1899 is not applicable to reclamation projects owned and operated by the state.

IV. The Rivers and Harbors Act of 1899 Is Not Applicable to Water Diversions from Federal Reclamation Projects Built and Operated Under the Reclamation Act of 1902.

Both the State and the United States argued below that section 10 of the Rivers and Harbors Act of 1899 is not applicable to water diversions from federal reclamation projects built and operated under the Reclamation Act of 1902, 43 U.S.C. §§ 371 *et seq.* The Court of Appeal ruled, however, that such diversions are subject to the 1899 Act unless Congress has specifically authorized the project.[13]

Congress, in enacting the Reclamation Act of 1902, established a program to develop a water supply for agricultural and other interests in the western states. Sections 2 and 10 of the Act provide that the projects are to be operated by the USBR. 43 U.S.C. §§ 411, 373. Section 8 of the Act provides that the appropriation and distribution of water under the Act are subject to state laws not inconsistent with "clear congressional directives." *Id.* at §§ 372, 383; *California v. United States,* 438 U.S. 645 (1978). The Court of Appeals' decision, however, authorizes the Corps to override water allocations for federal projects established by the USBR under section 2 and 10, or by states under section 8. Moreover, the decision allows the Corps to override these allocations on grounds wholly unrelated to

13. California has an interest in whether the Corps is authorized to control water diversions from federal reclamation projects because (1) the projects provide economic and other benefits to the state in which the projects are located, and (2), as noted earlier, federal law authorizes the states to control water allocations from the projects.

navigation. Nothing in the language or legislative history of the Reclamation Act of 1902 even suggests the possibility that Congress meant for water allocations from the federal projects to be subject to the Corps' authority under the Rivers and Harbors Act of 1899.

The Court of Appeals stated that the Reclamation Act of 1902 is inapplicable here because that Act applies in "the context of reclamation." App. 37. Inexplicably, the court overlooked the fact that the water diversions in this case are part of a *reclamation* scheme for federal and state reclamation projects.

The Court of Appeals, relying on this Court's decisions in *City of Fresno v. California,* 372 U.S. 627 (1963), and *Ivanhoe Irrig. Dist. v. McCracken,* 357 U.S. 275 (1958), stated that section 8 of the Reclamation Act of 1902 is primarily intended to allow state law to define the value of water rights for which compensation must be made when the water rights are taken for reclamation purposes. App. 35. The court misread the impact of this Court's recent decision in *California v. United States, supra,* where this Court, reversing parts of its earlier decisions in the *Fresno* and *Ivanhoe* cases, ruled that section 8 provides the states with broad control of both the appropriation and distribution of water developed by the federal projects. 438 U.S. at 670-674.

V. The Issues in This Case Have Never Been Decided by This Court.

This Court has never addressed the issues presented here. The Court has considered the Corps' authority under the Rivers and Harbors Act of 1899 in several cases, specifically *Sanitary District v. United States,* 266 U.S. 405 (1925), *Wisconsin v. Illinois,* 278 U.S. 367 (1929), *United*

States v. Republic Steel Corp., 362 U.S. 482 (1960), and *United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690 (1899). The *Sanitary District* and *Wisconsin* cases involved water diversions from Lake Michigan which had the effect of substantially lowering the lake level and thus impairing commerce among the several states adjacent to the lake; the purpose of the diversions was to create a sewage disposal system in an interstate river flowing through Illinois. The *Republic Steel* case involved waste discharges into the same interstate river in Illinois. The *Rio Grande* case involved a dam on a tributary of the Rio Grande River which would have diverted almost the entire flow of that river, and which was not authorized pursuant to a state water allocation plan or pursuant to state water rights laws; the Court held that the federal government has inherent power to prevent construction of a dam which will thus impair navigation and commerce.[14] Interestingly, all these cases involved interstate waters which had a direct effect on interstate commerce. None involved waters that, as here, arise and flow in a single state.

More importantly, none of these cases involved the Corps' authority to control water diversions that are part of a state water allocation scheme established under the water

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14. In the *Rio Grande* case, this Court stated that the Rivers and Harbors Act of 1890, 26 Stat. 454, which is the antecedent of the Rivers and Harbors Act of 1899, prohibits water diversions that obstruct navigation. 174 U.S. at 707-708. The main holding, however, was that the United States has inherent power to restrain such diversions. *Id.* at 701-707. Further, there is no indication in the case that the dam was authorized pursuant to state authority, much less pursuant to the kind of water allocation scheme that is the common product of modern state water rights laws. Finally, the Rio Grande River flows through several states, and the proposed dam, by diverting virtually the entire river flow, would have had a direct impact on interstate commerce; this Court has always emphasized that the western states' control of their waters is less where interstate waters are involved. See, *e.g.*, *California v. United States*, 438 U.S. 645, 662 (1978) .

rights laws of the western states. None involved water diversions from a facility that was owned and operated by the state itself. None involved water diversions from a federal reclamation project built and operated under the Reclamation Act of 1902. This case is thus one of first impression.

CONCLUSION

This case raises important federal questions concerning the interrelationship of federal and state power over the allocation of water resources. The questions have never been decided by this Court. The Court of Appeal's decision provides a simplistic analysis that fails to balance and harmonize federal and state interests in this critical area. Accordingly, this Court should grant our petition for writ of certiorari.

Respectfully submitted,

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(Appendices follow)

Appendix 1

Section 9, Rivers and Harbors Act of 1899:

"Construction of bridges, causeways, dams or dikes generally.

"It shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of the Army: *Provided,* That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of the Army before construction is commenced: *And provided further,* That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of the Army, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of the Army." 33 U.S.C. § 401.

Section 10, Rivers and Harbors Act of 1899:

"Obstruction of navigable waters generally; wharves; piers, etc.; excavations and filling in.

"The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or

other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same." 33 U.S.C. § 403.

Appendix 2

Sierra Club, a non-profit California Corporation, et al.,

Plaintiffs-Appellees,

v.

Cecil D. Andrus,* as Secretary of the Interior of the United States, et al.,

Defendants-Appellants,

Kern County Water Agency, a public agency, et al.,

Intervenors-Appellants.

Nos. 76-1464, 76-1494, 76-1534, 76-1651, 76-1663 and 76-1981.

United States Court of Appeals, Ninth Circuit.

Oct. 31, 1979.

Appeal from the United States District Court for the Northern District of California.

Before ELY, TRASK, and TANG, Circuit Judges.

ELY, Circuit Judge:

These appeals stem from the efforts of two environment associations and two private citizens[1] to control the pump-

*Mr. Andrus is the present Secretary of the Interior. He has been substituted as an appellant for one of his predecessors who was originally named as a party in his official capacity. Rule 43(c) Fed.R.App.P.

1. The appellees, plaintiffs below, are the Sierra Club, a non-profit California corporation having in excess of 130,000 members, of whom more than 40,000 are in the San Francisco Bay and Sacramento-San Joaquin Delta areas; Friends of the Earth, a non-profit New York corporation that has its principal place of business in San Francisco; Hank Schramm, a commercial fisherman active in the San Francisco Bay and the Pacific Ocean; and William Dixon, a Sacramento-San Joaquin Delta landowner.

ing of water from the Sacramento-San Joaquin Delta (the Delta) into the canals and aqueducts of the California Water Project. The facts are reported fully in the excellent opinion of District Judge Renfrew. *Sierra Club v. Morton,* 400 F.Supp. 610 (N.D.Cal.1975). After the first phase of a bifurcated trial the District Court ordered the federal[2] and state[3] defendants to obtain authorization for the operation of their pumping plants from the United States Army Corps of Engineers (the Corps), pursuant to section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403 (1970). The court also ordered the Secretary of the Army to prepare an environmental impact statement prior to the issuance of such authorization. *Id.* at 651. In addition, the

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2. The named federal appellants, the defendants below, were federal officers who administer the various agencies responsible for overseeing the operation, construction, and regulation of the facilities in question. They were Rogers C.B. Morton, Secretary of the Interior; Gilbert Stamm, Commissioner of the Bureau of Reclamation; Howard H. Callaway, Secretary of the Army; William C. Gribble, Jr., Chief of Engineers of the South Pacific Division of the United States Army Corps of Engineers; Col. Frederick J. Rockwell, District Engineer of the Army Corps of Engineers for the Sacramento, California District; and Col. James L. Lammie, District Engineer of the Army Corps of Engineers for the San Francisco, California district. Because all of these individuals were sued in their official capacity, their successors are automatically substituted as some of the appealing parties. Fed.R.App.P. 43(c).

3. The named state defendants in the District Court were Norman B. Livermore, Jr., Secretary for Resources; and John R. Teerink, Director of the Department of Water Resources. Like the federal parties, the named state appellants were sued in their official capacity, and their successors are automatically substituted as parties to the appeal in this court. Fed.R.App.P. 43(c).

The District Court also allowed the Kern County Water Agency, the Metropolitan Water District of Southern California, the Tulare Lake Basin Water Storage District, and the Santa Clara Valley Water District to intervene in these actions. The intervenors are public agencies of the State of California that have contracted for water from the California Water Project and have undertaken extensive financial obligations in reliance thereon.

court enjoined construction on the proposed Peripheral Canal until an environmental impact statement was prepared and authorization from the Corps was obtained. The Peripheral Canal would transfer water directly from the Sacramento River to a point close to the pumping plants. Since the trial court has not yet conducted the relief phase of the bifurcated trial, it has not yet determined whether the appellees are entitled to further relief; accordingly, it has allowed the continuing operation of the pumping plants.

Here, the federal and state parties present five principal arguments. First, they contend that the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401-418 (1970) (the Act), does not create a private right of action, and that, therefore, only the United States can enforce the permit requirements of section 10.[4] Second, they contend that even if a

4. Section 10 of the Rivers and Harbors Act of 1899 provides:

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

33 U.S.C. § 403 (1970).

private right of action exists, the appellees lacked standing to institute their suit. Third, it is asserted that section 10 does not apply to the pumping of water from the Sacra-

mento-San Joaquin Delta; and fourth, if compliance with section 10 is required, such compliance already exists. Finally, the federal parties argue that since their plant, the Tracy Pumping Plant, was fully operational before the enactment of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4347 (1970 & Supp. V 1975), no environmental impact statement is necessary if a section 10 permit is required. Neither the federal nor the state parties challenge the District Court's ruling concerning the Peripheral Canal.

We have concluded that a private right of action should be implied on behalf of parties who seek to enforce compliance with the permit requirements of section 10 of the Act and that three of the four plaintiffs, having alleged particularized injuries, possess the requisite standing to avail themselves of that right. We agree with the District Court that the pumping of Delta water falls within the broad reach of section 10 and that the state parties have been exporting Delta water in violation of that provision. Unlike the District Court, however, we believe that Congress authorized the present operational level of the federal pumping plant, thereby excusing its operators from the section 10 permit requirement. Because of this second conclusion, we do not reach the final issue, i. e., whether the federal parties would be legally required to prepare an environmental impact statement before granting a section 10 permit for the federal pumping plant. We therefore affirm in part and reverse in part.

I. FACTS

The federal and state pumping plants are integral elements of the Central Valley and State Water Projects, which, together, constitute the California Water Project.

The Central Valley Project, administered by the United States Bureau of Reclamation, consists of dams, reservoirs, pumping plants, canals, and other facilities designed to generate hydroelectric power, provide flood control, and supply water for irrigation and other uses in the Central Valley of California. To this end, water from the winter runoff is stored behind dams in the Sacramento River and then released, as needed, to flow down river and into the Sacramento-San Joaquin Delta, where it merges with other Delta waters. The Tracy Pumping Plant, a principal component of the Central Valley Project, pumps water from the Delta into the Delta-Mendota Canal, a 115-mile canal leading to the Mendota pool in the Central Valley. The pumping capacity of the Tracy Pumping Plant is 4,602 cubic feet per second. In 1973 this plant pumped 2,127,341 acre-feet of water from the Delta.

The State Water Project, created by the Burns-Porter Act of 1959 and now codified in Cal. Water Code §§ 12930-12942 (West 1971), is the state analogue to the Central Valley Project. It also consists of dams, canals, pumping plants, and other facilities designed to generate power, provide flood control, and transfer water from the Delta to the more arid regions of central, coastal, and southern California. The state pumping plant, known as the Delta Pumping Plant, is central to the operation of this water project. Like the Tracy Pumping Plant, it withdraws water from the Delta, pumping it into a canal, where the water ultimately is permitted to flow to its place of use. The pumping capacity of the Delta Pumping Plant is now approximately 6,300 cubic feet per second. This capacity can be increased to approximately 10,300 cubic feet per second by the installation of additional pumping units, and it is contemplated that the first of these pumps will in fact be

operational by 1980. In 1973 the Delta Pumping Plant withdrew 1,261,120 acre-feet of water from the Delta. The State of California, through its Department of Water Resources, has already entered into contracts providing that at some future time the State Water Project will annually deliver 4,230,000 acre-feet of water, of which 95 percent will be pumped by the Delta Pumping Plant. With the addition of the Peripheral Canal the potential withdrawal of Delta water by both the Tracy and Delta Pumping Plants will increase to approximately 7,000,000 acre-feet in 1990 and approximately 7,750,000 acre-feet by 2020.

The pumping, past and present, has had a significant impact upon the Delta. The District Court found

> that export pumping by these facilities both lowered Delta water levels and at certain times caused net flow reversals in Delta waterways. Although it is true that the exact magnitude of these effects was not precisely established, it is clear that they are far from any sort of *de minimus* exception . . .

400 F.Supp. at 632.[5] Before we address whether this impact falls within the Corps' regulatory jurisdiction under

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5. Because the Delta water flows in San Francisco Bay and is directly affected by the tidal cycle, water in the Delta channels and rivers tends to flow both up channel and down channel during the tidal cycle. For any given tidal cycle, however, there is a greater volume of flow in one direction. The amount of this excess is the net flow. A net flow reversal occurs when the net flow for a given tidal cycle is in a different direction from that of the normal direction.

The District Court considered several studies of the effect of the pumping on Delta water levels. A 1968 study, conducted by varying the pumping rates of the Tracy Plant and measuring the actual effect on water levels at various points, concluded that Delta water levels near the inlet channel of the plant were lowered .1 foot per 1000 cubic feet per second pumped. Effects of the pumping were detected as far away as the San Joaquin and Sacramento Rivers. Another study measuring the combined effect of the Tracy and Delta Plants concluded that diversion of between 9,600 cubic feet per second and 12,000 cubic feet per second during

section 10, it is obvious that we must first determine whether plaintiffs, as private individuals, can enforce the permit requirements of that section.[6]

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both high high and low high tides resulted in a lowered water level of 1.0 to 1.5 feet at one location near the pumping plants and almost .1 foot at a location on the San Joaquin River.

The District Court found that the above figures represented the minimum effect of the pumping plants on Delta water levels and that it was "highly probable if not certain" that an increase in the amount of pumping would result in greater effects. 400 F.Supp. at 631.

6. Prior case law has not definitively resolved the issue. Recently, our Circuit recognized an implied private right of action for damages caused by the negligent operation and maintenance of a bridge over navigable waters, alleged to constitute violations of both section 10 and a provision of the Bridge Act of 1906, 33 U.S.C. § 512 (1970). *Riggle v. California,* 577 F.2d 579 (9th Cir. 1978). Although *Riggle* did not involve either the permit requirement of section 10 or injunctive relief, that decision strongly supports our reading of the Act. *See* 577 F.2d at 582-83.

On the other hand, in general terms the Third Circuit has stated that Congress, in exercising its regulatory authority over navigation, did not "create any civil cause of action in favor of private parties injured by any violation of the Act." *Red Star Towing & Transp. Co. v. Department of Transportation of New Jersey,* 423 F.2d 104, 105 (3d Cir. 1970). That case, however, presented a different issue, whether the 1899 Rivers and Harbors Act abrogated the eleventh amendment immunity of a state from suit in admiralty. According to the Third Circuit, Congress did not intend such a result. *Id.* at 106; *cf. Williamson Towing Co. v. Illinois,* 534 F.2d 758 (7th Cir. 1976) (regulation under Bridge Act of 1906, 33 U.S.C. §§ 491-498 (1970), does not abrogate state immunity from suit in admiralty); *Intracoastal Transp., Inc. v. Decatur County,* 482 F.2d 361 (5th Cir. 1973) (same). But *cf. Chesapeake Bay Bridge & Tunnel Dist. v. Lauritzen,* 404 F.2d 1001, 1003 (4th Cir. 1968) (state immunity abrogated by reason of regulation under the Rivers and Harbors Act of 1899).

Here, an eleventh amendment issue is not present because appellees sought only injunctive relief requiring the State to conform its conduct to the requirements of a federal statute. *See Edelman v. Jordan,* 415 U.S. 651, 664, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). To the extent that *Red Star Towing* may be construed as holding that no private right of action exists under section 10, we disagree. *Cf. Libby Rod and Gun Club v. Poteat,* 594 F.2d 742 (9th Cir. 1979) (*sub silentio* recognition of private casue of action under section 9 of the Act) (*see* discussion of *Libby Rod and Gun Club* at note 36, *infra*).

II. PRIVATE RIGHT OF ACTION

To determine whether a statute contains an implied private remedy, a court should consider four separate questions. First, is the plaintiff a member of the "class for whose especial benefit the statute was enacted?" *Texas & Pacific Railway Co. v. Rigsby,* 241 U.S. 33, 39, 36 S.Ct. 482, 484, 60 L.Ed. 874 (1916). Second, is there any indication of legislative intent, explicit or implicit, either to create or to deny a private right of action? Third, do the underlying purposes of the legislative scheme conflict with private enforcement of the act? Fourth, and last, "is the cause of action one traditionally relegated to state law, in an area basically the concern of the States, so that it would be inappropriate to infer a cause of action based solely on federal law?" *Cort v. Ash,* 422 U.S. 66, 78, 95 S.Ct. 2080, 2088, 45 L.Ed.2d 26 (1975); *see Piper v. Chris-Craft Industries,* 430 U.S. 1, 37-41, 97 S.Ct. 926, 51 L.Ed.2d 124 (1977); *Securities Investor Protection Corp. v. Barbour,* 421 U.S. 412, 95 S.Ct. 1733, 44 L.Ed.2d 263 (1975); *National Railroad Passenger Corp. v. National Association of Railroad Passengers,* 414 U.S. 453, 457-458, 94 S.Ct. 690, 38 L.Ed.2d 646 (1974); *Starbuck v. City & County of San Francisco,* 556 F.2d 450, 454 (9th Cir. 1977).

Although we have found no hard and precise indication of a congressional intent to create or deny a private remedy under section 10, we believe, without significant doubt, that such a remedy does exist. The plaintiffs below are members of a class for whose benefit Congress enacted the statute, and implication of a private remedy is both consistent with the purposes of the Act and complementary to its enforcement.

A. *Beneficiaries of the Rivers and Harbors Act*

[1] The plaintiffs in this case who use the Delta and the San Francisco Bay also belong to the class for whose especial benefit the statute was enacted. Long ago, in 1888, the Supreme Court decided that federal common law did not prohibit obstructions and nuisances in navigable waters of the United States. *Willamette Iron Bridge Co. v. Hatch,* 125 U.S. 1, 8 S.Ct. 811, 31 L.Ed. 629 (1888). Therefore, the Court held that a private party could not obtain an injunction against the construction of a bridge over a navigable water. Congress promptly responded by enacting section 10 of the Rivers and Harbors Act of 1890, 26 Stat. 426, 454, which forbids obstructions not affirmatively authorized by law. This section, with minor changes, became section 10 of the 1899 Act. Since that time, courts have granted relief to private parties who suffer special injury because of unauthorized obstructions. For example, in *Neches Canal Co. v. Miller & Vidor Lumber Co.,* 24 F.2d 763 (5th Cir. 1928), a lumber company sued to recover losses caused by the construction of an unauthorized sand dam in the Neches River. The company recovered the expense it had incurred in raising its logs, which had sunk in the river because of the obstruction. In *Tatum v. Blackstock,* 319 F.2d 397 (5th Cir. 1963), a landowner with property adjacent to navigable waters sought to enjoin unauthorized dredging and filling, which would have altered the flow of the navigable waters to the detriment of his property. The court upheld a preliminary injunction against further activity until the Corps of Engineers issued a permit. Recently, our own court remanded for trial one of the consolidated appeals in *Leslie Salt Co. v. Froehlke,* 578 F.2d 742 (9th Cir. 1978), in which a private association contended that diked evaporation ponds in and around Bair Island in San Francisco Bay were

built in violation of the Act because Corps permits had not been obtained.[7]

[2] The federal parties argue that only the federal government is a beneficiary of the Act, relying upon an isolated statement of the Supreme Court in *Wyandotte Transportation Co. v. United States,* 389 U.S. 191, 201, 88 S.Ct. 379, 386, 19 L.Ed.2d 407 (1967), that "a principal beneficiary of the Act, if not the principal beneficiary, is the Government itself." *Wyandotte,* however, does not preclude private parties from also being recognized as beneficiaries of the Act.[8] Indeed, the Court's pronouncement, which expressly leaves open the class for whose benefit the Act was passed, was made in the context of expanding, not contracting, the remedies under the Act. As the District Court succinctly stated, "Sections 9 and 10 were enacted both to

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7. The intervening state water agencies contend that the Act is meant to benefit only those who are involved in navigational pursuits. The cases cited above amply refute the contention that the Act is so limited. All *users* of navigable waters are beneficiaries of the Act.

8. The Supreme Court, itself, at least *sub silentio,* has recognized others as beneficiaries of the Act. In *Wisconsin v. Illinois,* 278 U.S. 367, 49 S.Ct. 163, 73 L.Ed. 426 (1929), the plaintiffs, alleging in their complaint a violation of the Act, sought to enjoin the withdrawal of 8,500 cubic feet of water per second from Lake Michigan. The defendants, having received a permit from the Secretary of War authorizing the withdrawal, raised the Act as a defense. Significantly, the Court, not pausing to question whether plaintiffs had the right to invoke the protection of the Act, only stated that the facts pleaded by plaintiffs constituted a cause of action. *Id.* at 409, 49 S.Ct. 163. The Court then proceeded directly to a review of the defendants' activity. Finding that the defendants' permit had authorized only a temporary withdrawal of water and that absent continuing authorization the withdrawal was unlawful, the Court held that the withdrawal should be enjoined. *Id.* at 417-21, 49 S.Ct. 163. This case, standing alone, might constitute adequate authority for allowing others beside the federal government to enforce the requirements of the Rivers and Harbors Act. The decision openly recognizes that others are beneficiaries of the Act's provisions.

prevent injuries to private parties as a result of obstructions to navigable capacity which were not authorized by the United States and to allow the United States to regulate obstructions to the navigable capacity of its navigable waterways." 400 F.Supp. at 623 (footnote omitted).

B. *Legislative Intent*

[3] The legislative history of the Rivers and Harbors Act of 1899 does not reflect a congressional intent either to afford a private remedy or to deny one.[9] Nor is the statutory language itself determinative. Section 12 of the Act provides for the enforcement of section 10, making a violation of section 10 a misdemeanor punishable by either a fine or imprisonment and authorizing a district court to enjoin the violation.[10] Section 17 of the Act, in conjunction with section

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9. The intervening state water agencies contend that the legislative history does suggest an intent to foreclose private enforcement of the Act. By amendment to a bill considered prior to the 1890 statute, which later became part of 1899 Act, the Senate eliminated language allowing suit by private persons and substituted language restricting enforcement to United States Attorneys. S.27, 50th Cong., 1st Sess., 19 Cong.Rec. 2338 (1887). A close reading of the amendment, however, discloses that the Senate was addressing the question whether a private party could enforce the penal provisions of the legislation. It is generally agreed that such *qui tam* actions are not permitted. *See, e. g., Jacklovich v. Interlake, Inc.*, 458 F.2d 923 (7th Cir. 1972); *Connecticut Action Now, Inc. v. Roberts Plating Co.*, 457 F.2d 81 (2d Cir. 1972). The amendment does not indicate a legislative intent to preclude other private actions under the 1899 Act.

10. Section 12 provides:

> Every person and every corporation that shall violate any of the provisions of sections 401, 403, and 404 of this title or any rule or regulation made by the Secretary of the Army in pursuance of the provisions of section 404 of this title shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 nor less than $500, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court. And further, the removal of any structures or parts of structures erected in violation of the

12, places the duty of enforcement upon the Attorney General and the Department of Justice.[11]

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provisions of the said sections may be enforced by the injunction of any district court exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States.

33 U.S.C. § 406 (1970). Although this section expressly mentions enjoining only the erection of "structures" in violation of section 10, it is now settled that a District Court may enjoin any obstruction that violates section 10. *United States v. Republic Steel Corp.*, 362 U.S. 482, 491-92, 80 S.Ct. 884, 4 L.Ed.2d 903 (1960).

11. Section 17 provides:

The Department of Justice shall conduct the legal proceedings necessary to enforce the provisions of sections 401, 403, 404, 406, 407, 408, 409, 411, 549, 686, and 687 of this title; and it shall be the duty of United States attorneys to vigorously prosecute all offenders against the same whenever requested to do so by the Secretary of the Army or by any of the officials hereinafter designated, and it shall furthermore be the duty of said United States attorneys to report to the Attorney General of the United States the action taken by him against offenders so reported, and a transcript of such reports shall be transmitted to the Secretary of the Army by the Attorney General; and for the better enforcement of the said provisions and to facilitate the detection and bringing to punishment of such offenders, the officers and agents of the United States in charge of river and harbor improvements, and the assistant engineers and inspectors employed under them by authority of the Secretary of the Army, and the United States collectors of customs and other revenue officers shall have power and authority to swear out process, and to arrest and take into custody, with or without process, any person or persons who may commit any of the acts or offenses prohibited by the said sections, or who may violate any of the provisions of the same: *Provided,* That no person shall be arrested without process for any offense not committed in the presence of some one of the aforesaid officials: *And provided further,* That whenever any arrest is made under such sections, the person so arrested shall be brought forthwith before a commissioner, judge, or court of the United States for examination of the offenses alleged against him; and such commissioner, judge, or court shall proceed in respect thereto as authorized by law in case of crimes against the United States.

33 U.S.C § 413 (1970).

[4] Normally, these express statutory provisions would imply that no other means of enforcement are intended, with only clear contrary evidence of a legislative intent to rebut this presumption. *See Securities Investor Corp. v. Barbour, supra,* 421 U.S. at 419, 95 S.Ct. 1733; *National Railroad Passenger Corp. v. National Association of Railroad Passengers, supra,* 414 U.S. at 458, 94 S.Ct. 690. This principle, however, does not apply to the Rivers and Harbors Act of 1899. The Supreme Court has consistently construed the Act's language in a manner apparently aimed toward effectuating the underlying statutory policies. *See, e.g., Wyandotte Transp. Co. v. United States, supra,* 389 U.S. at 201, 88 S.Ct. 379; *United States v. Republic Steel Corp.,* 362 U.S. 482, 80 S.Ct. 884, 4 L.Ed.2d 903 (1960). The Court has already determined that the penal provisions of the Act do not preclude implication of a civil action. *Cort v. Ash, supra,* 422 U.S. at 79, 95 S.Ct. 2080. *Wyandotte Transp. Co. v. United States, supra,* 389 U.S. at 201-202, 88 S.Ct. 379. Accordingly, we believe that the Attorney General's enforcement responsibilities were not meant to foreclose the implication that private actions are authorized to promote the purposes of section 10.[12] Rather,

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12. Examining a similar statutory scheme, the Supreme Court held that a provision expressly providing for enforcement by the Attorney General did not preclude implication of a private remedy. In *Allen v. State Board of Elections,* 393 U.S. 544, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969), the Court identified a private right of action to enforce the Voting Rights Act of 1965, 42 U.S.C. §§ 1973-1973p (1970), notwithstanding an express provision that "the Attorney General may institute . . . an action for preventive relief," *id.* § 1973(j). 393 U.S. at 554-57, 89 S.Ct. 817.

Like the Voting Rights Act of 1965, the Rivers and Harbors Act of 1899 provides that "proper proceedings . . . may be instituted under the direction of the Attorney General of the United States." 33 U.S.C. § 406 (1970). As in *Allen,* the express reference does not necessarily preclude a private right of action. Rather, we must further determine whether it would be consistent with the broad purposes of the Act to imply such a remedy.

> [w]e read the 1899 Act charitably in light of the purpose to be served. The philosophy of the statement of Mr. Justice Holmes . . . that "A river is more than an amenity, it is a treasure," forbids a narrow cramped reading either of § 13 or of § 10.

Republic Steel Corp., supra, 362 U.S. at 491, 80 S.Ct. at 890.

C. *Consistency with Legislative Scheme*

Our third inquiry concerns the consistency of implying a private right of action under section 10 with the underlying purposes of the legislative scheme. We perceive a private right of action as both consistent with the purposes of the Rivers and Harbors Act and complementary to its enforcement.

[5] Section 10 prohibits unreasonable obstructions to navigable capacity, and in those instances specifically enumerated in its second and third clauses, the statute directs the Secretary of the Army, acting upon the recommendation of the Chief of Engineers, to determine what constitutes an unreasonable obstruction. *Wisconsin v. Illinois,* 278 U.S. 367, 413, 49 S.Ct. 163, 73 L.Ed. 426 (1929). The underlying purpose of section 10 is clear. That purpose is to keep the navigable waters of the United States free from unreasonable obstructions. Private suits such as the present one promote this policy by assuring Corps review of those activities that could obstruct the navigable capacity of the Nation's waters by altering or modifying their course, condition, or capacity.[13]

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13. We do not mean to imply that the Corps should consider only navigational interests when issuing a permit. Since the passage of the 1899 Act, Congress has enacted additional legislation directing federal officials to consider ecological and environmental effects in addition to navigation when discharging their duty. *See, e. g.,* Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-666c (1976); National Environmental Policy Act of 1969, 42 U.S.C.

[6] The District Court reasoned that exclusive enforcement of the criminal provisions should be vested in the Attorney General but that the Attorney General had neither the time nor the resources to seek redress for all violations of the Act. 400 F.Supp. at 624-25. The court concluded that a private right of action was necessary to protect private parties who suffer special injuries because of these violations. *Id.* at 625. We agree,[14] but we do not rest this conclusion solely upon recognition of the Attorney General's lack of resources. An additional problem, exemplified by this case, is that the federal government, which is specifically directed to enforce the Act, may itself be charged with violating its provisions.[15] Unless private rights of action are permitted, federal violations could operate so as to wholly frustrate the purposes of the Act. *See Illinois ex rel. Scott v. Hoffman,* 425 F.Supp. 71, 75-76 (S.D.Ill.1977); *cf. Miller v. Mallery,* 410 F.Supp. 1283, 1289 (D.Or.1976).

Unlike the possible result faced by the Supreme Court in *Securities Investor Protection Corp. v. Barbour, supra,* 421

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§§ 4321-4347 (1970 & Supp. V 1975). *See generally Zabel v. Tabb,* 430 F.2d 199 (5th Cir. 1970), *cert. denied,* 401 U.S. 910, 91 S.Ct. 873, 27 L.Ed.2d 808 (1971).

14. *See generally River v. Richmond Metropolitan Auth.,* 359 F.Supp. 611 (E.D.Va.), *aff'd,* 481 F.2d 1280 (4th Cir. 1973).

15. In this respect, the federal appellants base one of their arguments against upholding a private right of action on the contention that to allow such an action would amount to finding an implied waiver of sovereign immunity. We, however, have the obligation to ensure federal compliance with those measures enacted by Congress to protect the environment. To the extent that the involved federal officials have exceeded their statutory authority or have exercised that authority in an illegal manner, this suit falls within one of the well recognized exceptions to sovereign immunity. *City of Santa Clara v. Andrus,* 572 F.2d 660, 679 (9th Cir.), *cert. denied,* 439 U.S. 859, 99 S.Ct. 177, 58 L.Ed.2d 167 (1978); *Association of Northwest Steelheaders v. United States Army Corps of Eng'rs,* 485 F.2d 67, 69 (9th Cir. 1973); *Washington v. Udall,* 417 F.2d 1310, 1314 (9th Cir. 1969).

U.S. 412, 95 S.Ct. 1733, 44 L.Ed.2d 263, and *National Railroad Passenger Corp. v. National Association of Railroad Passengers, supra,* 414 U.S. 453, 94 S.Ct. 690, 38 L.Ed.2d 646, implication of a private remedy under section 10 does not raise the spectre of judicial encroachment upon executive policymaking. It is not here argued that the Corps cannot issue permits for the continued operation of the Tracy and Delta Pumping Plants. The Corps can grant to the appropriate federal and state officers permission to continue their pumping operations. If permits are properly obtained, the right of the appellees to enforce section 10 will not then extend so as to entitle them to obtain redress for their injury. It remains true that the Congress and the Corps ultimately decide which activities affecting navigable waters are permissible.[16]

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16. This result distinguishes *Securities Investor Protection Corp. v. Barbour,* 421 U.S. 412, 95 S.Ct. 1733, 44 L.Ed.2d 263 (1975) and *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers,* 414 U.S. 453, 94 S.Ct. 690, 38 L.Ed.2d 646 (1974), two Supreme Court cases in which no private rights of action were found to exist. In both of those cases, the plaintiffs sought to challenge decisions made by corporate entities created by Congress to solve public problems. Had the Court recognized a private right of action, the subsequent litigation would have undercut the decisions of the corporations, thus upsetting the legislative scheme devised by Congress. *Securities Investor Protection Corp. v. Barbour, supra,* 421 U.S. at 422-23, 95 S.Ct. 1733; *National R.R. Passenger Corp. v. National Ass'n of R.R. Passengers, supra,* 414 U.S. at 463, 94 S.Ct. 690. Additionally, in both instances, the legislation and its relevant history indicated an attempt to preclude private rights of action. *Securities Investor Protection Corp. v. Barbour, supra,* 421 U.S. at 420 n. 3, 421, 95 S.Ct. 1733; *National R.R. Passengers Corp. v. National Ass'n of R.R. Passengers, supra,* 414 U.S. at 457-61, 94 S.Ct. 690. Thus, no private right of action was found to exist.

Here, the private right of action asserted by the appellees is not aimed at the decisions of the agency enforcing the Act. They are not challenging the issuance of permits, nor are they attempting to require the United States to prosecute a party for violation of the Act. Rather than attempting to disrupt the legislative scheme, the appellees are seeking to enforce that scheme.

D. *State Law*

[7, 8] Finally, we hold that this case is not the type of action traditionally relegated to state law. The appellants focus on allegations of the possible adverse effects upon fish and wildlife, contending that these are basically state concerns to be remedied under the law of nusiance. This approach is much too narrow. Activities affecting the navigable capacity of navigable waters of the United States are matters of federal, not state, law. *Wyandotte Transportation Co. v. United States, supra,* 389 U.S. at 201, 88 S.Ct. 379. We agree with the District Court that

> [t]here is a federal interest in protecting persons from injuries resulting from unauthorized obstructions to the navigable capacity of navigable waters of the United States and possible federal instrusion into the area of state nuisance law is necessary so that the federal interest asserted here will not be compromised by contrary state law.

400 F.Supp. at 625.

[9-11] We emphasize, even though such emphasis should be unnecessary, that our decision does not permit private parties to enforce the criminal provisions of the Rivers and Harbors Act. The Act does not authorize *qui tam* actions[17] to enforce its criminal penalties. Section 17 of the Act, 33 U.S.C. § 413 (1970), vests exclusive enforcement of its penal provisions in the Department of Justice. *Jacklovich v. Interlake, Inc.,* 458 F.2d 923 (7th Cir. 1972); *Connecticut Action Now, Inc. v. Roberts Plating Co.,* 457 F.2d 81 (2d Cir. 1972); *Durning v. ITT Rayonier, Inc.,* 325

17. A *qui tam* action is a civil proceding in which an informer sues for the Government, as well as for himself, to recover a penalty under a particular statute. Statutory authority for the action must be specifically provided. *Connecticut Action Now, Inc. v. Roberts Plating Co.,* 457 F.2d 81, 84 (2d Cir. 1972).

F.Supp. 446 (W.D.Wash.1970). Nor do we intend to hold that private parties may sue on behalf of the general public or seek to enjoin violations of section 13 of the Act, 33 U.S.C. § 407 (1970). These questions are not before us, but there is good and sufficient reason to express our thought that this responsibility is also committed exclusively to the Department of Justice. *See Connecticut Action Now, supra* at 88-89; *Guthrie v. Alabama By-Products Co.*, 328 F.Supp. 1140, 1144-48 (N.D.Ala.1971), *aff'd*, 456 F.2d 1294 (5th Cir. 1972), *cert. denied*, 410 U.S. 946, 93 S.Ct. 1352, 35 L.Ed.2d 613 (1973); *Bass Angler Sportsman Society v. United States Steel Corp.*, 324 F.Supp. 412, 416 (N.D., M.D., S.D.Ala.1971), *aff'd*, 447 F.2d 1304 (5th Cir. 1971) (per curiam).

[12] Accordingly, we hold that private parties who suffer special injuries because of unauthorized activities affecting the navigable capacity of our Nation's waters may sue to enforce the permit requirements of section 10. There are no indicia of legislative intent to exclude a private right of action, and without this remedy, users of the Delta and the San Francisco Bay would be unable to obtain Corps review of the activities that are causing them injury.

III. STANDING

The intervening state water agencies contend that the appellees lacked standing to bring their action. Under the Supreme Court cases of *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 96 S.Ct. 1917, 48 L.Ed.2d 450 (1976), and *Warth v. Seldin*, 422 U.S. 490 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975), as succinctly summarized by us in *Bowker v. Morton*, 541 F.2d 1347 (9th Cir. 1976), a plaintiff must allege "(a) a particularized injury (b) concretely and demonstrably resulting from defendants' action

(c) which injury will be redressed by the remedy sought." *Id.* at 1349.

The individual appellees meet the standard.[18] Both have alleged a particularized injury caused by the pumping, and, although the injury may continue if the Corps eventually allows continued pumping, it may be redressed if the Corps restricts or regulates the pumping operations. Unlike the plaintiffs in *Simon v. Eastern Kentucky Welfare Rights Organization, supra,* 426 U.S. 26, 96 S.Ct. 1917, who sued the Secretary of the Treasury to contest a revenue ruling

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18. The District Court found:

Plaintiffs in this case are The Sierra Club, Friends of the Earth, Hank Schramm, and William Dixon. The Sierra Club is a nonprofit California corporation having in excess of 130,000 members of whom more than 40,000 live in San Francisco Bay and the Sacramento-San Joaquin Delta areas. Included in the membership of the Sierra Club are many persons who use the waters referred to in the complaint for recreational purposes, including, but not limited to, boating, fishing and swimming. The stated purposes of the Sierra Club included the preservation and conservation of the natural resources, fish, and wildlife of the United States, including its rivers, bays, wetlands, deltas, and estuarine areas.

Friends of the Earth is a nonprofit New York corporation which has its principal place of business in San Francisco. Its stated purposes include the preservation, restoration, and rational use of the environment.

Hank Schramm is and has been engaged for the past 20 years in the business of commercial fishing and the operation of sports fishing and party boats in the San Francisco Bay and the Pacific Ocean. Schramm has an economic interest in this controversy since he depends for his livelihood on the maintenance, preservation, and conservation of sports and commercial fisheries in the San Francisco Bay and the adjoining waters of the Pacific Ocean.

William Dixon owns substantial property in the Delta, including a partnership interest in the St. Germain Duck Club on Simmons Island, and consequently has an economic interest in the maintenance, preservation, and conservation of adequate non-polluted supplies of water in the Delta and San Francisco Bay regions.

400 F.Supp. at 619.

favorable to nonprofit hospitals offering only emergency room services to indigents, the individual plaintiffs' injury "can be traced to the challenged action of the defendant, and [is] not injury that results from the independent action of some third party not before the Court." *Simon, supra* at 41-42, 96 S.Ct. at 1926.[19]

[13, 14] The intervenors further contend that the appellees did not meet the second standing requirement, a nonconstitutional requirement, that "the interest sought to be protected by the complainant [is] arguably within the zone of interest to be protected or regulated by the statute in question." *Association of Data Processing Service Organizations, Inc. v. Camp,* 397 U.S. 150, 153, 90 S.Ct. 827, 830, 25 L.Ed.2d 184 (1970); *Simon v. Eastern Kentucky Welfare Organization, supra,* 426 U.S. at 39, n.19, 96 S.Ct. 1917. The intervenors' argument is founded upon their belief that the zone of interest to be protected encompasses only navigational pursuits, a tenet that is incorrect. Under section 10 the Corps must consider not only the effect of an activity upon navigation, but also its impact upon the environment. *United States v. Joseph G. Moretti, Inc.,* 526 F.2d 1306, 1310 (5th Cir. 1976); *Zabel v. Tabb,* 430 F.2d 199, 213-14 (5th Cir. 1970), *cert. denied,* 401 U.S. 910, 91 S.Ct. 873, 27 L.Ed.2d 808 (1971). We therefore hold that the

19. The intervenors argue that no evidence of injury to these plaintiffs was adduced at trial, and, thus, that the appellees were without standing. Under the pretrial order, however, the District Court has deferred taking evidence relating to the environmental effect of the pumping upon the Delta and the San Francisco Bay until the second phase of the trial, which has not yet occurred. Certainly, the intervenors do not dispute that there is evidence that the pumping has caused net flow reversals and lowered water levels in the Delta. The appellees have sufficiently alleged a demonstrable, particularized injury that may result from the pumping activities, and they will have the opportunity to prove their injury in the second portion of the bifurcated trial.

appellees' interest in the environmental quality of the Delta and San Francisco Bay is within the zone of interests protected under the Rivers and Harbors Act. *See Alameda Conservation Association v. California,* 437 F.2d 1087, 1091 (9th Cir.), *cert. denied,* 402 U.S. 908, 91 S.Ct. 1380, 28 L.Ed.2d 649 (1971) (standing for private party alleging injury to fish).

[15, 16] Because the individual appellees possess the requisite standing to maintain this suit, it would ordinarily be needless for us to consider whether the environmental association also have standing. *Arlington Heights v. Metropolitan Housing Development Corp.* 429 U.S. 252, 263-64 & n.9, 97 S.Ct. 555, 50 L.Ed.2d 450 (1977). Since the second portion of the bifurcated trial has not yet occurred, however, we think it desirable to offer some procedural guidelines to the District Court. We shall address the issue briefly. An organization's abstract concern with a subject is insufficient to confer the requisite standing, *Sierra Club v. Morton,* 405 U.S. 727, 92 S.Ct. 1361, 31 L.Ed.2d 636 (1972), but when the organization fails to allege an injury to itself as an organization, it can establish standing by showing that it represents individual members who have themselves suffered injury and who thus could have properly sued in their own right. *Simon v. Eastern Kentucky Welfare Rights Organization, supra,* 426 U.S. at 40, 96 S.Ct. 1917; *Warth v. Seldin, supra,* 422 U.S. at 511, 95 S.Ct. 2197. The Sierra Club has satisfied the test by alleging injuries to members who use the San Francisco Bay for boating and recreational purposes. Friends of the Earth, on the other hand, has not met the requirement. It has alleged nothing more than a general organizational interest in preservation of the environment.[20] Thus, it has no standing to invoke

20. *See* note 18, *supra.*

judicial resolution of the controversy. The judgment of the District Court is vacated as to Friends of the Earth, and upon remand the District Court will dismiss the compla[illegible] as to Friends of the Earth.

IV. SECTION 10 OF THE RIVERS AND HARBORS ACT OF 1899

We now turn to the merits. First, the appellants attack the trial court's decision on the scope of section 10 of the Rivers and Harbors Act of 1899.[21]

The statute contains three distinct proscriptive clauses. The first clause flatly prohibits the creation of any obstruction to "the navigable capacity of any of the waters of the United States" unless affirmatively authorized by Congress. The second and third clauses, on the other hand, permit certain activities in navigable waters provided that they proceed on plans "recommended by the Chief of Engineers and authorized by the Secretary of the Army." These activities include the building of structures in navigable waters and the alteration or modification "in any manner" of the condition, capacity, or channel of any navigable water.

The District Court held that

> the operation of the Tracy and Delta Plants obstructs the navigable capacity of various waters in the Delta, and because these obstructions are the result of the modification or alteration of the condition or capacity of the channel of navigable water, they are governed by the third clause of Section 10.

400 F.Supp. at 638. In so ruling, the court accepted the convincing factual evidence that export pumping by the Tracy and Delta facilities had lowered the level of navigable waters in the Delta by as much as 1.5 feet in at least

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21. *See* note 4, *supra*.

one place and had caused net flow reversals in certain channels.[22] The District Court apparently believed that the controlling issue was whether a given diversion constituted an obstruction to navigable capacity.[23]

[17] We decline to adopt the District Court's approach, believing that it would necessarily present the courts with difficult definitional problems in a variety of factual contexts. Instead, we interpret clauses 2 and 3 of section 10

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22. In their opening brief the state appellants assert that the trial court entertained "the mistaken belief" that water levels on the San Joaquin River would be lowered by 1.5 feet at low tide, a fact which was disputed by the testimony of a civil engineer with the California State Department of Water Resources. Brief for Appellants Norman Livermore and John Teerink [hereinafter cited as State Opening Brief] at 13. The District Court opinion, however, explicitly notes the difference of opinion as to the amount of diversionary impact on San Joaquin River levels. 400 F.Supp. at 630 n.27. The court clearly rested its finding of obstruction to navigable capacity on separate evidence that the water level would recede at least 1 to 1.5 feet in the vicinity of Clifton Court Ferry and that operation of the pumping plants was causing net flow reversals on the San Joaquin River and the Old and Middle Rivers. *Id.* at 631-32.

23. The court defined "navigable capacity" as "the capacity for navigation over any part of the waters in question when in their normal condition," and defined "obstruction to navigable capacity" as "to interfere with or diminish the navigable capacity of the waterway in question." 400 F.Supp. at 630 n.23 (*citing United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 709, 19 S.Ct. 770, 43 L.Ed. 1136 (1899), and *Hubbard v. Fort*, 188 F. 987, 996 (C.C.D.N.J.1911)). The court observed that in *Rio Grande* the Supreme Court had stated that not every appropriation of the upper waters of a navigable stream would constitute an "obstruction" to navigable capacity: "The question always is one of fact, whether such appropriation *substantially* interferes with the navigable capacity within the limits where navigation is a recognized fact." *Rio Grande, supra*, 174 U.S. at 709, 19 S.Ct. at 777, *cited* at 400 F.Supp. at 630 n.24 (emphasis added). The question thus becomes whether in a given case a proved effect on navigable waters is substantial enough to constitute an obstruction to navigable capacity. The difficulty with this approach is that it emphasizes too strongly the question whether an "obstruction to navigable capacity" has occurred at the expense of the different question whether there has been any alteration or modification of the condition or capacity of navigable waters.

as constituting a legislative enumeration of specific obstructions to navigable capacity that require Corps authorization. In other words, the building activities mentioned in clauses 2 and 3 are *presumed* to be obstructions to navigable capacity. Under the statute the Secretary of the Army determines whether these obstructions are reasonable. Thus, the facts in this case should be analyzed from the standpoint of whether there has been any modification or alteration of the condition or capacity of a navigable stream, rather than first determining whether there has been an obstruction to navigable capacity.[24] When one undertakes any of the activities described in clause 2 or by his activities brings about any of the results specified in

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24. The intervening appellants insist on the narrowest possible definition of navigable capacity. They argue that, in order to show the existence of an obstruction to navigable capacity, plaintiffs must prove, "among other things," the types of vessels that utilize a particular channel, the natural capacity of that channel to accommodate such navigation, the "navigational pursuits" of these types of vessels, and the degree to which changes in the condition or capacity of the channel may interfere with such pursuits. Brief for Intervenors and Appellants Kern County Water Agency, et al. [hereinafter cited as Intervenors' Brief] at 37-38. We fail to see any meaningful distinction between this definition of obstruction to "navigable capacity" and a showing of some effect on "actual navigation." Moreover, this argument of the intervenors is based on a fundamentally fallacious interpretation of section 10 and its three clauses, the premise of which is that under section 10 of the Rivers and Harbors Act of 1899,

> [n]ot all construction or work of the type described in Clauses 2 and 3 require approval of the Secretary of the Army. Section 10 approval is not required unless the structure or work would create some kind of obstruction, and then the Secretary is called on to determine the obstruction's reasonableness.

Id. at 35. This interpretation, which introduces the requirement of a procedural determination of substantial obstruction to navigable capacity prior to submission to the Corps for approval, leaves unaddressed the obvious problem of who is responsible for actually making the interpretation. As we see it, our acceptance of this construction of section 10 would stand the statute on its head.

clause 3, he violates section 10 if he has not first sought and obtained a permit from the Corps of Engineers.

In *Sanitary District v. United States,* 266 U.S. 405, 45 S.Ct. 176, 69 L.Ed. 352 (1925), the Supreme Court, construing the Rivers and Harbors Act of 1899, held that the diversion of water from Lake Michigan by the Sanitary District of Chicago fell within the scope of section 10 and was therefore beyond the power of a state in the absence of specific authorization by the Corps of Engineers. The Court referred to the fact that the Secretary of War had reviewed the Chicago Drainage Channel diversions in 1913, "including the obvious fact that so large a withdrawal would lower the levels of the Lakes and the overwhelming evidence that it would affect navigation." *Id.* at 430, 45 S.Ct. at 180. Nevertheless, Mr. Justice Holmes, for the Court, made no specific findings or determinations as to the effect on the actual navigable capacity of the lakes and rivers affected. The Court wrote:

> Evidence is sufficient, if evidence is necessary, to show that a withdrawal of water on the scale directed by the statute of Illinois threatens and will affect the level of the Lakes, and that is a matter which cannot be done without the consent of the United States, even were there no international covenant in the case.
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> * * * * * *
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> It is a broad expression of policy in unmistakable terms, advancing upon an earlier Act of September 19, 1890, . . . which forbade obstruction to navigable capacity "not affirmatively authorized by law" . . . . There is neither reason nor opportunity for a construction that would not cover the present case. As now applied it concerns a change in the condition of the Lakes and the Chicago River, admitted to be navigable, and, if that be necessary, an obstruction to their

> navigable capacity, . . . without regard to remote questions of policy. It is applied prospectively to the water henceforth to be withdrawn. This withdrawal is prohibited by Congress, except so far as it may be authorized by the Secretary of War.

266 U.S. at 426, 429, 45 S.Ct. at 179-180.

[18] Four years later, in *Wisconsin v. Illinois, supra,* 278 U.S. 367, 49 S.Ct. 163, 73 L.Ed. 426, the Supreme Court again dealt with massive diversions by the Sanitary District of Chicago, which had lowered, by "not less than six inches," the levels of Lakes Michigan, Huron, Erie, and Ontario, their connecting waterways, and the St. Lawrence River above tidewater. *Id.* at 400, 49 S.Ct. 163. Chief Justice Taft wrote:

> [T]he broad words of the first clause of . . . [section 10] were not intended to limit the second and third clauses and . . . *Congress' purpose was a direct prohibition of what was forbidden by them except when affirmatively approved by the Chief of Engineers and the Secretary of War.* . . .
>
> The true intent of the Act of Congress was that unreasonable obstructions to navigation and navigable capacity were to be prohibited, and *in the cases described in the second and third clauses of Section 10,* the Secretary of War, acting on the recommendation of the Chief of Engineers, was authorized to determine *what in the particular cases constituted an unreasonable obstruction.*

278 U.S. at 413, 49 S.Ct. at 170 (emphasis added). In short, the Corps must authorize any of the structures or activities enumerated in clauses 2 and 3, which are *presumed* to constitute obstructions. The need for applying to the Corps for a permit does not depend on some prior determination that there has been an obstruction to navigable capacity.

[19] Even more explicit is the opinion of the Supreme Court in *United States v. Republic Steel Corp., supra,* 362 U.S. 482, 80 S.Ct. 884. There, the Court held that the unauthorized deposit of industrial solids in the Calumet River, which reduced its depth by four to nine feet in some places, constituted an obstruction to navigable capacity and thus a violation of section 10. The Court carefully distinguished between the three clauses of the section:

> The reach of § 10 seems plain. Certain types of structures, enumerated in the second clause, may not be erected "in" any navigable river without approval by the Secretary of the Army. Nor may excavations or fills, described in the third clause, that alter or modify "the course, location, condition, or capacity of" a navigable river be made unless "the work" has been approved by the Secretary of the Army. There is, apart from these particularized invasions of navigable rivers, which the Secretary of the Army may approve, the generalized first clause which prohibits "the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity" of such rivers. *We can only conclude that Congress planned to ban any type of "obstruction," not merely those specifically made subject to approval by the Secretary of the Army. It seems, moreover, that the first clause being specifically aimed at "navigable capacity" serves an end that may at times be broader than those served by the other clauses. Some structures mentioned in the second clause may only deter movements in commerce, falling short of adversely affecting navigable capacity. And navigable capacity of a waterway may conceivably be affected by means other than the excavations and fills mentioned in the third clause.* We would need to strain hard to conclude that the only obstructions banned by § 10 are those enumerated in the second and third clauses. *In short, the first clause is aimed at protecting "navigable capacity," though it is adversely*

> *affected in ways other than those specified in the other clauses.*

362 U.S. at 486-87, 80 S.Ct. at 887-888 (emphasis added). Clearly, the structures and activities set forth in the second and third clauses need not be shown to obstruct navigable capacity before federal authorization is required by the terms of the statute.

[20] Finally, recent Fifth Circuit authority has established beyond cavil that an alteration or modification of navigable waters is sufficient to trigger the permit requirement of section 10 of the Rivers and Harbors Act. In *United States v. Joseph G. Moretti, Inc.* (*Moretti I*), 478 F.2d 418, 429 n.37 (5th Cir. 1973), the Fifth Circuit held that "any filling of navigable waters creates an obstruction to navigation." When the same party came before the Fifth Circuit again, the court held that to trigger the permit requirements of the third clause of section 10, a party need only prove

> factual circumstances showing some effect upon navigable waters, some alteration or modification of either course, location, condition or capacity of those waters. These statutory terms are broad and undefined. So long as activities fall within this generous scope, those activities are subject to the jurisdiction of the Corps.

United States v. Joseph G. Moretti, Inc. (*Moretti II*), 526 F.2d 1306, 1309 (5th Cir. 1976);[25] *accord, Weiszmann v. District Engineer, United States Army Corps of Engineers,*

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25. Apparently, under *Moretti II* a persuasive showing of "damaging ecological effects upon navigable waters" suffices to establish an alteration or modification in the condition and capacity of waters violating section 10, clause 3. *Id.* at 1310. Because of our conclusion and the specific issues that are before us, we express no opinion as to the extent to which ecological considerations may trigger the need for a permit under section 10.

526 F.2d 1302, 1305 (5th Cir. 1976); *United States v. Sexton Cove Estates, Inc.*, 526 F.2d 1293, 1296-99 (5th Cir. 1976).

The state appellants and intervenors, however, present another argument in support of their interpretation of section 10. They argue that Congress has left to the states the regulation of water rights, including direct water supply diversions, and that

> [t]o a large extent Congress has chosen to subordinate navigation uses to those diversions. Consequently application of Section 10 of the 1899 Act to State authorized water supply diversions requires a substantially greater demonstration of tangible interference with navigable capacity, than does application of Section 10 to structures, fills, or sewage dilution diversion activities that do not relate to public water supply.

Intervenors' Brief, *supra* note 24, at 46. *See also* State Opening Brief, *supra* note 22, at 14-20. To support their argument, those parties cite various congressional enactments, primarily in the area of reclamation, which contain generalized statements announcing a congressional policy of federal noninterference in state water laws and rights.[26]

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26. In the appendix to their brief, the intervenors set out excerpts from 37 statutes containing references to congressional recognition of state water rights, particularly in the area of state-authorized water diversions for irrigation or consumption purposes. Typical of these statements is one found in section 8 of the Reclamation Act of June 17, 1902, 43 U.S.C. § 383 (1970), which provides that nothing in that Act

> shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of such sections, shall proceed in conformity with such laws, and nothing in such sections shall in any way affect any right of any State or of the Federal Government or of

The case authority interpreting the reclamation statutes makes it clear to us that a principal purpose of such reference to state law "is to leave to state law the *definition* of the property interests, if any, for which *compensation* must be made" when these state or private rights and interests are acquired by eminent domain. *City of Fresno v. California,* 372 U.S. 627, 629-30, 83 S.Ct. 996, 998, 10 L.Ed.2d 28 (1963) (emphasis added). The Supreme Court, analyzing the effect on the California Central Valley Project of broad language recognizing state water rights in section 8 of the Reclamation Act of 1902,[27] explained.

> [I]t merely requires the United States to comply with state law when, in the construction and operation of a reclamation project, it becomes necessary for it to acquire water rights or vested interests therein. But the acquisition of water rights must not be confused with the operation of federal projects. As the Court said in [*State of*] *Nebraska v.* [*State of*] *Wyoming,* supra [325 U.S. 589, 615, 65 S.Ct. 1332, 89 L.Ed. 1815 (1945)]: "We do not suggest that where Congress has provided a system of regulation for federal projects it must give way before an inconsistent state system."

Ivanhoe Irrigation Dist. v. McCracken, 357 U.S. 275, 291, 78 S.Ct. 1174, 1183-1184, 2 L.Ed.2d 1313 (1958). Similarly, in *United States v. Gerlach Live Stock Co.,* 339 U.S. 725, 70 S.Ct. 955, 94 L.Ed. 1231 (1960), the Supreme Court specifically held that section 8 of the 1902 Act reflected a congres-

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any landowner, appropriator, or user of water in, to, or from any interstate stream or the waters thereof.

Other representative statutes cited by the intervenors include the Flood Control Act of 1944, 33 U.S.C. § 701-1(b) (1970); the Water Supply Act of 1958, 43 U.S.C. § 390(b)(a) (1970); and the Federal Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251(b), 1370 (Supp. V 1975).

27. 43 U.S.C. § 383 (1970), *quoted at* note 26 *supra.*

sional intent, for the purposes of the Act, not to take water rights without compensation under the navigational servitude. *Id.* at 737-39, 70 S.Ct. 955.

As the Court has recently indicated, just last Term, the general restriction on federal action embodied in section 10 is that the Secretary of the Interior must "appropriate, purchase, or condemn necessary water rights in strict conformity with state law." *California v. United States,* 438 U.S. 645, 665, 98 S.Ct. 2985, 2996, 57 L.Ed.2d 1018 (1978). In that case, the Court, correcting some confusion concerning the scope of section 8 engendered by its prior opinions, ruled that the recognition of state law mandated by section 8 is not limited to situations in which the United States acquires water rights:

> Section 8 cannot be read to require the Secretary to comply with state law only when it becomes necessary to purchase or condemn vested water rights. That section does, of course, provide for the protection of vested water rights, but it also requires the Secretary to comply with state law in the "control, appropriation, use, or distribution of water."

438 U.S. at 674-75, 98 S.Ct. at 3001. Therefore, the State of California was permitted to impose any conditions on the United States Bureau of Reclamation's appropriation of water from the Central Valley Project that did not conflict with clear congressional directives authorizing the project. Mr. Justice Rehnquist, writing for the majority, emphasized that state water law governs federal operation of reclamation projects only to the extent that Congress has chosen not to legislate otherwise. The Court reaffirmed the validity of the basic holdings of *Ivanhoe, supra,* 357 U.S. 275, 78 S.Ct. 1174, 2 L.Ed.2d 1313, and *Fresno, supra,* 372 U.S. 627, 83 S.Ct. 996, 10 L.Ed.2d 28, i.e., that specific congressional directives concerning reclamation override

state law to the extent that there is a conflict between the two bodies of authority. 438 U.S. at 670-72, 98 S.Ct. at 2999; *see id.* at 670 n.23, 671 n.24, 98 S.Ct. 2985.

Section 8 of the 1902 Reclamation Act and the other statutory provisions for federal deference to state water rights do not lend support to the novel suggestion made by the appellants despite the new vitality given those provisions by *California v. United States.* The congressional policy of compliance with state law for the appropriation, purchase, condemnation, and distribution of water rights, in the absence of express congressional provision to the contrary, cannot be lifted from the context of *reclamation* so as to encroach upon the express provisions of the Rivers and Harbors Act, a statute directly concerned with obstructions to and modifications of navigable waters, enacted under the congressional power over commerce and *navigation. Cf. Gerlach, supra,* 339 U.S. at 731-42, 70 S.Ct. 955.

The Rivers and Harbors Act, of course, does not itself mention noninterference with state-authorized water supply diversion operations. The appellants point to no authority supporting their interpretation of section 10, under which the Act assertedly is to be applied differently in situations in which a state has authorized water diversions. In *United States v. Rio Grande Dam & Irrigation Co.,* 174 U.S. 690, 19 S.Ct. 770, 43 L.Ed. 1136 (1899), a case upon which the appellants attach some reliance, the Supreme Court clearly recognized that the federal authority over navigable waters delegated by Congress to the Corps under the Rivers and Harbors Act of 1890, the predecessor of the 1899 Act, overrides any state power to authorize a water diversion project that would adversely affect navigation. The power of states over waters within their dominions, the Court held

> is limited by the superior power of the General Government to secure the uninterrupted navigability of all navigable streams within the limits of the United States. In other words, the jurisdiction of the General Government over interstate commerce and its natural highways vests in that Government the right to take all needed measures to preserve the navigability of the navigable water courses of the country even against any state action.

174 U.S. at 703, 19 S.Ct. at 775. The Court observed that prior to 1890 Congress, through legislation, "recognized and assented to the appropriation of water" by states and private entities organized under state law, but ruled that the Rivers and Harbors Act controlled the issue insofar as any conflict existed. Referring to the 1890 Act, the Court wrote:

> [I]t is obvious that Congress meant that thereafter no State should interfere with the navigability of a stream without the condition of national assent. It did not, of course, disturb any of the provisions of prior statutes in respect to the mere appropriation of water of *non-navigable* streams in disregard of the old common-law rule of continuous flow, and its only purpose, as is obvious, was to affirm that as to *navigable waters nothing should be done to obstruct their navigability without the assent of the National Government.* It was an exercise by Congress of the power, oftentimes declared by this court to belong to it, of national control over navigable streams . . . . *The language is general, and must be given full scope.* It is not a prohibition of any obstruction to the navigation, but any obstruction to the navigable capacity, and *anything, wherever done or however done,* within the limits of the jurisdiction of the United States *which tends to destroy the navigable capacity* of one of the navigable waters of the United States, is within the terms of the prohibition.

174 U.S. at 708, 19 S.Ct. at 777 (emphasis added).

In *Sanitary District v. United States, supra,* 266 U.S. 405, 45 S.Ct. 176, 69 L.Ed. 352, the Supreme Court specifically dealt with state diversions of water for public health purposes, describing as plenary the power of Congress to remove what it identifies as obstructions to interstate and foreign commerce.

> This is not a controversy between equals. The United States is asserting its sovereign power to regulate commerce and to control the navigable waters within its jurisdiction.
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> * * * * * *
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> The main ground is the authority of the United States to remove obstructions to interstate and foreign commerce. *There is no question that this power is superior to that of the States to provide for the welfare or necessities of their inhabitants.* In matters where the States may act the action of Congress overrides what they have done. . . . But in matters where the national importance is imminent and direct even where Congress has been silent the States may not act at all.

266 U.S. at 425-26, 45 S.Ct. at 178-179 (emphasis added).

[21, 22] While states undeniably possess broad power to regulate their own navigable waters for the general welfare, the power clearly is, and should be subordinate to the federal navigational power unless Congress expressly defers to the state authority in the context of a specific statute. Since Congress did not so defer to state authority in the case of the Rivers and Harbors Act of 1899, the State of California's powers over navigable waters cannot narrow the authority of the Corps over navigable waters as applied to state water diversions.[28]

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28. The Court, in *United States v. Rio Grande Dam & Irrigation Co.,* 174 U.S. 690, 19 S.Ct. 770, 43 L.Ed. 1136 (1899), illustrated

[23] In sum, we hold that the lowering of water levels, as established in this case, amounts to an alteration or modification of the condition or capacity of Delta waters under clause 3 of section 10, and thus requires authorization by the Corps. This result follows without regard to the effect of the pumping plants on actual navigable capacity because a prior finding of obstruction to navigable capacity is not necessary in order to trigger the effect of clauses 2 and 3 of section 10. The federal authority set forth in the Rivers and Harbors Act of 1899 reigns paramount. Congressional deference to traditional state regulation of water rights, a consideration of significance in other contexts, does not operate to restrict the express policy of section 10.

V. AUTHORIZATION

Having determined that the construction and operation of the Tracy and Delta Plants require the approval of the

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this proposition of overriding federal supremacy in the area of navigation with an example:

> The Hudson River runs within the limits of the State of New York. It is a navigable stream, and a part of the navigable waters of the United States, so far at least as from Albany southward. One of the streams which flows into it and contributes to the volume of its waters is the Croton River, a nonnavigable stream. Its waters are taken by the State of New York for domestic uses in the city of New York. Unquestionably the State of New York has a right to appropriate its waters, and the United States may not question such appropriation, unless thereby the navigability of the Hudson be disturbed. On the other hand, if the State of New York should, even at a place above the limits of navigability, by appropriation for any domestic purposes, diminish the volume of waters, which, flowing into the Hudson, make it a navigable stream, to such an extent as to destroy its navigability, undoubtedly the jurisdiction of the National Government would arise and its power to restrain such appropriation be unquestioned . . . .

174 U.S. at 709, 19 S.Ct. at 777.

Corps under section 10, the District Court then ruled that both facilities lacked the required authorization. The respective appellants offer different arguments in respect to the Tracy Pumping Plant, a federal facility, and the California's Delta Pumping Plant. The federal appellants content that various congressional acts affirmatively authorized the Tracy Plant under section 10, clause 1. The state appellants maintain that various section 10 permits issued over the years for certain components of the Delta Plant constitute authorization for the entire Delta Plant. In addition, the state appellants urge that a Federal Power Commission license for portions of the California Water Project eliminated any need to obtain section 10 approval. Other contentions made by the appellants in the District Court are not pressed on this appeal. We first consider the question of congressional authorization of the Tracy Pumping Plant.

A. *Congressional Authorization of the Tracy Pumping Plant.*

The trial court found no congressional authorization of the Tracy Pumping Plant. It based its decision on the legal conclusion that "[t]he initial authorization to create an obstruction must rest on express and not implied Congressional authority. . . . The approval or funding of a facility does not compromise Congress's right to control its operation." 400 F.Supp. at 637 (*citing Sanitary District v. United States, supra,* 266 U.S. at 428, 45 S.Ct. 176, and *Hubbard v. Fort,* 188 F. 987, 996 (C.C.D.N.J.1911).[29]

29. The District Court principally relied upon the following statement from *Sanitary District*:

> The act [of March 2, 1827, ch. 51, 4 Stat. 234] granted land to Illinois in aid of a canal to be opened by the State for the purpose of uniting the waters of the Illinois River with those of Lake Michigan, but if it has any bearing on the present

[24] The rationale of the District Court sweeps too broadly. In our view, congressional approval or authorization may be found in virtually any type of statute, includ-

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> case it certainly vested no irrevocable discretion in the State with regard to the amount of water to be withdrawn from the Lake. It said nothing on that subject. We repeat that we assume that the United States desires to see the canal maintained and therefore pass by as immaterial all evidence of its having fostered the work. *Even if it had approved the very size and shape of the channel by act of Congress it would not have compromised its right to control the amount of water to be drawn from Lake Michigan.* It seems that a less amount than now passes through the canal would suffice for the connection which the United States has wished to establish and maintain.

266 U.S. at 427-28, 45 S.Ct. at 179 (emphasis added). Applying what it perceived to be the Supreme Court rule, the District Court held:

> In the instant case none of the acts in question either contain sufficiently explicit language or are accompanied by a legislative history clearly manifesting approval of the facilities for the purpose of Section 10. *For the most part* these acts do not even refer specifically to the pumping plant but rather are very general approvals of the Central Valley Project or the San Luis unit. *All Congress did was authorize the construction of those projects and appropriate funds for them.* Congress did not, however, agree to relinquish its Section 10 responsibilities or exercise this power in any respect. *Even if Congress had gone so far as specifically to fund the construction of the Tracy Plant precisely as it stands today, this fact would not constitute authorization to operate it, as before operation occurred, either Congress or the Corps of Engineers would have to consider within what Section 10 parameters the Tracy Plant could operate and issue an appropriate authorization.*

400 F.Supp. at 637-38 (emphasis added).

In the quoted passage from *Sanitary District*, the Supreme Court strictly construed the actions of the United States as to the diversion of Lake Michigan waters. In that case the federal government had brought suit to enjoin the Sanitary District of Chicago from diverting water from the lake in excess of a specified amount. The District had defended on the basis of estoppel, arguing that "the United States has given its assent to all that has been done and . . . it is estopped to take the position" that the diversions constituted obstructions to navigable capacity. 266 U.S. at 427, 45 S.Ct. at 179. It was, therefore, in the context of considering an argument of

ing appropriations statutes, so long as it is demonstrated that Congress had knowledge of the precise action or project at issue and was explicitly and specifically addressing that project. *United States v. Arizona,* 295 U.S. 174, 55 S.Ct. 666, 79 L.Ed. 1371 (1935), casts light upon the principle. There, the Supreme Court held that the Parker Dam, which the United States planned to build in the Colorado River between Arizona and California, was not authorized by any congressional act, as required by the Rivers and Harbors Act of 1899. The Government, contending that Congress had approved the dam, cited a 1904 Act authorizing the diversion of Colorado River waters for the purpose of irrigating adjoining lands on Indian reservations. *Id.* at 185, 55 S.Ct. 666. In support of its construction, the Government asserted that under the 1904 Act another structure, the Laguna Dam, had previously been built across the Colorado.

Rejecting the Government's argument, the Supreme Court pointed out that "Congress has made appropriations for the benefit of the project of which it [the Laguna Dam]

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estoppel against the Government that Mr. Justice Holmes stated that the "strict construction of the Government's act" avoided the defendant's contention. *Id.* Accordingly, the import of *Sanitary District* is not that Congress must affirmatively authorize *both* construction *and* operation of a diversion project for it to be legal under section 10, as the District Court supposed. Instead, the Supreme Court simply stated that Congress is *not precluded* from setting limits on the amount of a water diversion even if it has previously authorized the specific project. An analogue in the instant case would arise if the federal government itself were actively seeking to restrict the amount of water diverted by the Tracy Plant. None contends that it could not do that, if it so chose. The right of the Congress to control the operation of a facility that it has previously approved, however, is not at issue here. In short, we cannot accept the proposition that *Sanitary District* supports the finding that section 10 requires separate approval by either Congress or the Corps for both the construction and the operation of a water diversion project.

is a part and so recognized and approved the building of the dam," citing Acts of 1916, 1917, and 1918 making appropriations for the Yuma Project, Arizona-California, which includes the Laguna Dam. *Id.* at 186 n.5, 55 S.Ct. 666. As to the Parker Dam, however, the Court refused to hold that Congress had authorized the project under the 1904 Act "by making appropriations for irrigation of lands in Indian reservations." *Id.* Unlike the situation in our case, the 1904 Act did not specifically address the project at issue. *Compare* Rivers and Harbors Act of 1937, ch. 832, 50 Stat. 844, 850, *quoted* at n.31 *infra,* with Act of Apr. 21, 1904, § 25, 33 Stat. 224.

[25] *United States v. Arizona, supra,* teaches that Congress, while it may authorize a project by means of general appropriations legislation, must have known and intended that the specific facility in question was a part of the project for which it was making appropriations. This interpretation is supported by other cases holding that Congress may authorize activities by means of appropriations legislation that specifically and directly relates to the projects in question.[30] We also note that the Corps' administrative

30. *See United States v. Dickerson,* 310 U.S. 554, 60 S.Ct. 1034, 84 L.Ed. 1356 (1940) (Congress could suspend certain military re-enlistment allowances, provided for by prior legislation, by means of an amendment to an appropriations bill); *Wisconsin v. Duluth,* 96 U.S. 379, 382-88, 24 L.Ed. 668 (1878) (by means of an appropriation, Congress had "adopted, recognized, and taken charge of" a project previously initiated privately without congressional authorization); *Friends of the Earth v. Armstrong,* 485 F.2d 1, 9-10 (10th Cir. 1973) (en banc) (Congress can, by an appropriations act, suspend or modify a prior act concerning the spreading of waters impounded in Lake Powell into Rainbow Bridge National Monument), *cert. denied,* 414 U.S. 1171, 94 S.Ct. 933, 39 L.Ed.2d 120 (1974); *United States v. Kennedy,* 278 F.2d 121, 122-23, 126 (9th Cir. 1960) (General Appropriation Act of 1951, Act of Sept. 6, 1950, 64 Stat. 595, appropriating funds for the National Park Service, provided necessary statutory authorization for taking of

regulations governing issuance of permits are consistent with this principle:

> The general legislation by which Federal agencies are empowered to act generally is not considered to be sufficient authorization by Congress to satisfy the purposes of Section 10. If an agency asserts that it has Congressional authorization meeting the test of Section 10 or would otherwise be exempt from the provisions of Section 10, *the legislative history and/or provisions of the Act should clearly demonstrate that Congress was approving the exact location and plans from which Congress could have considered the effect on navigable waters* of the United States or that Congress intended to exempt that agency from the requirements of Section 10.

33 C.F.R. § 322.3(c)(1) (1978) (emphasis added). Generally, a court should accord great weight to the construction of a statute by the agency responsible for its administration. *E. g., California v. United States, supra,* 438 U.S. at 676 n.30, 98 S.Ct. 2985; *Zemel v. Rusk,* 381 U.S. 1, 11, 85 S.Ct. 1271, 14 L.Ed.2d 179 (1965); *Udall v. Tallman,* 380 U.S. 1, 16, 85 S.Ct. 792, 13 L.Ed.2d 616 (1965).

The question thus narrows itself to whether the various congressional statutes and legislative history concerning the Central Valley Project are so sufficiently specific as to the Tracy Pumping Plant as to constitute congressional authorization under Section 10. In our view, the basic enactments authorizing the Central Valley Project in 1937 and the annual appropriations acts for operation and mainte-

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land within boundaries of Mount McKinley National Park); *cf. City of Santa Clara v. Andrus,* 572 F.2d 660, 672 (9th Cir.), *cert. denied,* 439 U.S. 859, 99 S.Ct. 177, 58 L.Ed.2d 167 (1978) (to show congressional ratification of an electrical power allocation scheme by appropriation of money, "the government must sustain the heavy burden of demonstrating Congressional knowledge of the precise course of action alleged to have been acquiesced in").

nance of the Central Valley Project, when read in light of the legislative history of the broad oversight exercised by the Congress over the project, constitute affirmative authorization of the Tracy Plant.

The Rivers and Harbors Act of 1937, ch. 832, § 2, 50 Stat. 844, 850, reauthorized the entire Central Valley Project, theretofore authorized and established under the Emergency Relief Appropriation Act of 1935, 49 Stat. 115.[31] As of 1937, then, Congress had clearly authorized the Central Valley Project, the general plans of which contemplated a large-scale diversion of water from the Delta to the San Joaquin Valley. Subsequently, Congress enacted the Reclamation Project Act of 1939, ch. 418, 53 Stat. 1187 (codified at 43 U.S.C. §§ 375a, 387-389, 485-485h, 485i-485k (1970)). Section 9(a) of the Act, 43 U.S.C. § 485h(a) (1970), provides that federal reclamation projects were to become auto-

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31. The Rivers and Harbors Act of 1937 declared the Central Valley Project

> to be for the purposes of improving navigation, regulating the flow of the San Joaquin River and the Sacramento River, controlling floods, *providing for storage and for the delivery of the stored waters thereof,* for the reclamation of arid and semiarid lands and lands of Indian reservations, and other beneficial uses, and for the generation and sale of electric energy as a means of financially aiding and assisting such undertakings and in order to permit the full utilization of the works constructed to accomplish the aforesaid purposes: *Provided further,* That, except as herein otherwise specifically provided the provisions of the reclamation law, as amended, shall govern the repayment of expenditures and the construction, operation, and maintenance of the dams, canals, power plants, *pumping plants,* transmission lines, and identical works *deemed necessary to said entire project,* and the Secretary of the Interior may enter into repayment contracts, and other necessary contracts, with State agencies, authorities, associations, persons, and corporations, either public or private, including all agencies with which contracts are authorized under the reclamation law. . . .

Rivers and Harbors Act of 1937, ch. 832, § 2, 50 Stat. 844, 850.

matically authorized when the Secretary of the Interior found them to be feasible and submitted a favorable report to the President and to the Congress.[32] On February 24, 1947, the Secretary of the Interior forwarded to Congress a Finding of Feasibility pursuant to the 1939 Reclamation Act. H.R. Doc. No. 146, 80th Cong., 1st Sess. (1947), *reprinted in* Engle, *Central Valley Project Documents,* H.R. Doc. No. 416, 84th Cong., 2d Sess., pt. 1, at 574 (1956). The feasibility report contained a detailed discussion of the Delta-Mendota Canal, the 115-mile canal connecting the Mendota Pool in the San Joaquin Valley with the Tracy Pumping Plant. The initial contract for construction of the Delta-Mendota Canal was dated June 14, 1946, and the canal's construction was completed prior to July 1, 1952. The initial construction contract for the Tracy Pumping Plant was made on June 23, 1947, with construction of the Plant completed prior to February 1, 1953.

Over the years Congress has repeatedly appropriated funds for the Tracy facilities. These appropriations acts have generally lumped together funds for the Central Valley Project as a whole. As such, the situation appears to come within the dictum of *United States v. Arizona* that "Con-

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32. Section 485h(a) reads, in pertinent part, as follows:

> If the proposed construction is found by the Secretary to have engineering feasibility and if the repayable and returnable allocations to irrigation, power, and municipal water supply . . ., together with any allocation to flood control or navigation . . ., equal the total estimated cost of construction as determined by the Secretary, then the *new project, new division of a project, or supplemental works on a project, covered by his findings, shall be deemed authorized and may be undertaken by the Secretary.* If all such allocations do not equal said total estimated cost, the said new project, new division, or new supplemental works may be undertaken by the Secretary only after provision therefor has been made by Act of Congress . . . .

43 U.S.C. § 485h(a) (1970) (emphasis added).

gress has made appropriations for the benefit of the project of which it is a part and so *recognized and approved* the building" of the project under the Rivers and Harbors Act of 1899. *United States v. Arizona, supra,* 295 U.S. at 186, 55 S.Ct. 666, at 670 (emphasis added).[33] It is manifest from the legislative history that Congress was well aware of the Tracy Pumping Plant as part of the Central Valley Project, fully approved of it, and consistently encouraged its construction and operation.[34]

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33. Moreover, the First Deficiency Appropriation Act of 1946, ch. 589, 59 Stat. 632, 647-48 (1945), contained an appropriation "for construction of the . . . Delta division, Delta-Mendota canal, $7,500,000," and the Interior Department Appropriation Act of 1949, ch. 754, 62 Stat. 1112, 1129 (1948), contained a specific appropriation for the Tracy Pumping Plant Switchyard.

34. The legislative history of congressional authorization of and appropriations for the Central Valley Project is fully covered in Engle, *Central Valley Project Documents,* H.R. Doc. No.416, 84th Cong., 2nd Sess., pt. 1 (1956), and H.R.Doc.No.246, 85th Cong., 1st Sess. (1957).

A 1946 House report stated that funds were to be provided for transmission lines to bring "power to the Delta area *where it will be required for the pumping of water for* irrigation and water supply purposes. The sum recommended would provide funds to begin construction of this line, extending from Oroville to Tracy." H.R. Rep.No.1288 on H.R.4805, 79th Cong., 1st Sess. (1946), *reprinted in* Engle, *supra,* pt. 2, at 21 (emphasis added). Again, in 1947, an appropriation was made for completion of the power transmission line, "which will ultimately be extended to Tracy to provide power for pumping water in the Delta area. . . ." *Id., reprinted in* Engle, *supra,* pt. 2, at 22-23. In 1949 the following statement appears in H.R.Rep.No.2038, 80th Cong., 2d Sess. (1948), *reprinted in* Engle, *supra,* pt. 2, at 27-28:

> The drought which large areas in California have experienced this past winter reemphasizes the necessity for expediting the construction of the irrigation facilities of the Central Valley project. To this end the committee has made liberal appropriations for storage and irrigation facilities. It has also provided all funds necessary to continue construction of the powerplants and switchyards at Shasta and Keswick Dams, the Oroville-Tracy transmission line and the switchyard at the Tracy pumps on the Delta-Mendota canal . . . . None of the funds in the bill and no funds heretofore provided for switch-

In 1960 Congress authorized the construction of the San Luis Unit of the Central Valley Project. Act of June 3,

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> yards are to be used for the construction . . . of any switchyard facilities at Tracy not required for the operation of the project pumps . . . .

See Act of June 29, 1948, ch. 754, 62 Stat. 1112, 1128-29. The Senate report discussing the same bill stated:

> The committee recognizes that the Central Valley project has since its inception contemplated the construction of transmission lines done [sic] the West side of the Sacramento River as well as down the East side from Shasta Dam to the Tracy pumping plant, which lines are an integral part of this multiple-purpose project.

S.Rep.No.1609, 80th Cong., 2d Sess. (1948), *reprinted in* Engle, *supra,* pt. 2, at 28. In 1952 Commissioner of Reclamation Michael W. Straus testified at Senate hearings on the Central Valley Project appropriations bill for that year:

> I want to report particularly on the Central Valley project of California *that this committee has protected and financed* since Reclamation was given the job of making California's half-century dream come true. . . .
>
> The California Legislature has declared August 1 to August 10 a Central Valley Project Festival. The reason for these dates is that our multiple-year, multiple-purpose job of completing the original authorized project is virtually complete. On August 1 water will be released from Shasta Dam, carried down the Sacramento River through Shasta and Keswick generators, through the cross-channel-canal cut, *lifted up 200 feet by the great Tracy pumps,* sloshed down the long Delta-Mendota Canal to the Mendota pool, where it will be exchanged for water trapped by Friant Dam in the San Joaquin River, and carried 158 miles down the Friant-Kern Canal to Bakersfield.
>
> That is an overall total movement of water 500 miles—the farthest that man has moved water anywhere at any time. *That is a culmination of the work this committee has supported over the years.*
>
> It will be a period of rejoicing the whole length of the California Valley. It is my hope that the members of this committee *who protected and nursed the project into being* can accept some of the multiple invitations I know they are going to receive to see *the attainment of the committee's objective.*

Engle, *supra,* pt. 2, at 37 (emphasis added). Further references to the Tracy Pumping Plant and specific appropriations therefor as an integral part of the Central Valley Project abound in the legislative history. *E. g., id.* at 21-28, 32-38, 40-44, 49, 50-51, 60, 65, 305.

1960, Pub.L. No.86-488, 74 Stat. 156. In section 4 of the Act Congress expressly noted the precise location and plans of the Tracy Pumping Plant as a critical and integral part of the San Luis Unit project.[35] There is no evidence whatsoever that Congress intended to authorize the San Luis Unit if, and only if, the Corps of Engineers subsequently issued a section 10 permit on its own for either the construction or operation of the Tracy Plant. The District Court distinguished the 1960 Act on the ground that it was enacted after the commencement of the operation of the Tracy Plant, "and hence even if it were intended as Congressional consent, the original construction and operation of the Tracy Plant were unlawful." 400 F.Supp. at 637 n.41. We disagree. In *Wisconsin v. Duluth*, 96 U.S. 379, 24 L.Ed. 668 (1878), the Supreme Court upheld congressional authorization of a previously inaugurated private project on the basis of an appropriations act. The Court reasoned that it would unreasonably restrict Congress' power to hold that Congress could not retroactively approve previously unauthorized projects.

[26] We are therefore constrained to hold that the statutes and legislative history sufficiently demonstrate

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35. Section 4 of this Act provides, in pertinent part:

> If the Secretary proceeds to construct, operate, and maintain the San Luis Works under the terms of section 1 of this Act solely as a Federal project, the operation shall be subject to the following restriction: Whenever the chlorides in the water at the head of the Delta-Mendota Canal exceed one hundred and fifty parts per million during the months of July, August, or September, *the mean daily diversion from the Sacramento-San Joaquin Delta to San Luis unit via Tracy pumping plant and Delta-Mendota Canal* as measured at the San Luis pumping plant shall not exceed the mean daily import to the Sacramento Valley from the Trinity project.

Act of June 3, 1960, Pub.L.No.86-488, § 4, 74 Stat. 156, 159 (emphasis added).

congressional approval of the Tracy Pumping Plant and its operation, both at the initiation of the Central Valley Project and, retroactively, after the completion of the plant.[36]

B. *Corps Authorization of the Delta Pumping Plant*

In the District Court the state appellants contended that various section 10 permits issued with respect to components of the Delta Pumping Plant constituted Corps authorization of the plant itself. Here, they limit their argument to Permit No. 4101, issued in June 1967, which authorized the construction of the Clifton Court Forebay. This forebay, a reservoir between the Delta and the pumping plant, was designed to allow the pumping to be confined to off-peak electrical hours. Its only function is to serve as an intake facility for the Delta Pumping Plant.

Plainly, the permit does not authorize the entire Delta Pumping Plant. No direct evidence in the permit file refers to the pumping plant, and the permit itself only authorized the State "to cut the westerly levee, of West Canal, at Clifton Court Tract for Clifton Court Forebay in Contra Costa County, California." Nor can we construe the permit

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36. After the first draft of a proposed Opinion in the present appeal was circulated for the consideration of Judges Trask and Tang, our court issued its decision in *Libby Rod and Gun Club v. Poteat,* 594 F.2d 742 (9th Cir. 1979). Initially, *Libby* was the cause of concern on the part of the author of this Opinion, especially in respect to our conclusion that Congress had impliedly authorized the Tracy Pumping Plant. Certain broad language in *Libby* appeared to declare that, henceforth, the affirmative congressional authorization specifically required by the Rivers and Harbors Act for obstructions to navigable capacity of waters could not be conferred by appropriations bills alone, however, specific such an appropriation act may have been toward a particular project it was funding. *See* 594 F.2d at 746, esecially notes 5 and 6, and Judge Kennedy's dissenting opinion at 748-753. This concern, however, has been laid to rest by the concurring opinion of Judge Tang, who was one of the two judges constituting the majority in *Libby*. *See* pages .... to ...., slip op. 503 to 505, *infra.*

as implicit authorization for the Delta Plant. The Corps regulations required that a permit application be complete and without reference to any unattached correspondence. 33 C.F.R. § 209.130(b)(6) (1967). Maps and plans showing the location, extent, and character of the project were considered essential, and the proposed work was to be indicated in red ink. 33 C.F.R. §§ 209.130(c)(1), (c)(11) (1967). Given the completeness required of the application and the absence of any mention of the Delta Plant therein, we cannot appropriately say that the permit implicitly authorized more than the approved application upon which it was based.[37]

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37. Even if it could be said that Permit No. 4101 initially authorized the operation of the Delta Pumping Plant, the Corps yet retains the power to impose conditions upon the continuing pumping operation. As the state appellants concede, paragraph (f) of Permit No. 4101 provides, in respect to the authorized activity, that "if, in the oinion of the Secretary of the Army, it shall cause unreasonable obstruction to the free navigation of said water, the owner will be required . . . to remove or alter the structural work or obstructions caused thereby. . . ." Moreover, under the Corps' present regulations,

> [t]he District Engineer may reevaluate the circumstance and conditions of a permit either on his own motion or as a result of periodic progress inspection, and *initiate action to modify, suspend or revoke a permit as may be made necessary by consideration of the general public interest.* . . . Significant increases in scope of a permitted activity will be processed as new applications for permits in accordance with section 325.2 and not as modifications under this paragraph.

33 C.F.R. 325.7(a) (1978) (emphasis added). Thus, even if no further authorization is required to justify the continued existence of the Delta Pumping Plant because of the Corps' prior acquiescence in the plant's operations, the State is not relieved from section 10 permit requirements. Although the prior acquiscence by the Corps may establish a basis for estoppel against a Corps request to abolish the Delta Pumping Plant altogether, the operations of the plant remain subject to present regulations of the Corps. *See Sanitary Dist. v. United States*, 266 U.S. 405, 427-28, 45 S.Ct. 176, 69 L.Ed. 352 (1925); *cf. United States v. Sunset Coves, Inc.*, 514 F.2d 1089, 1090 (9th Cir.), *cert. denied*, 423 U.S. 865, 96 S.Ct. 125, 46 L.Ed.2d 94 (1975). Additionally, as we understand the above quoted Corps regulations, any significant increase in the pumping must have received Corps authorization.

The state appellants also contend that a Federal Power Commission (FPC) license for portions of the California Water Project eliminated the need for a section 10 permit. Had the FPC granted a license covering the Delta Pumping Plant, their position would have some support. *See Scenic Hudson Preservation Conference v. Callaway,* 370 F.Supp. 162, 164-68 (S.D.N.Y. 1973), *aff'd,* 499 F.2d 127 (2d Cir. 1974). But the FPC did not license the Delta Pumping Plant. Instead, it expressly and specifically declined to "extend our jurisdiction beyond those facilities actually constructed for power purposes so as to include hundreds of miles of canals, pumping stations and other associated facilities unrelated to the production of power." Department of Water Resources of the State of California, 51 F.P.C. 529, 533 (1974).

The Corps of Engineers has promulgated regulations to govern situations in which its jurisdiction overlaps with that of the FPC. When a project is subject to FPC regulation, the Corps fulfills its duty of protecting navigable waters by recommending to the FPC the inclusion of appropriate provisions rather than by directly issuing a Corps permit; however, "as to any other activities in navigable waters not constituting construction, operation and maintenance of physical structures licensed by the FPC . . . the provisions of 33 U.S.C. § 401 et seq. remain fully applicable." 33 C.F.R. § 320.3(f) (1978).

The FPC agrees that its license does not necessarily extend to all facilities of a project. In its opinion concerning the California Water Project, the FPC cautioned that "[t]he mere fact that various facilities are proposed for licensing by an applicant is not sufficient reason to assume that all such facilities are properly the subject of a license." The FPC also said, "[W]hen a particular facility is no longer

part of the power project itself, it is not subject to our licensing jurisdiction." Department of Water Resources of the State of California, 51 F.P.C. 529, 533 (1974).

Thus, both the Corps and the FPC have said that the State should apply to the Corps for a permit for construction of a water transportation facility unrelated to power production. Their construction of the interrelationship between the Federal Power Act and the Rivers and Harbors Act is entitled to much deference, and we will follow it here. *See Chemehuevi Tribe of Indians v. FPC,* 420 U.S. 395, 409-10, 95 S.Ct. 1066, 43 L.Ed.2d 279 (1975).

Although we reject the contentions of the state appellants as to the effect of Permit No. 4101 and the FPC license, it is conceivable that the State may still be excused from obtaining a permit for the operation of the Delta Pumping Plant. Present regulations of the Corps of Engineers contain a grandfather clause that dispenses with the need to obtain individual section 10 authorization for certain structures. The regulation provides, in pertinent part:

> The following structures or work are hereby permitted for purposes of Section 10 and do not require separate Department of the Army permits:
>
> * * * * * *
>
> (g) Structures or work completed before 18 December 1968 or in water-bodies over which the District Engineer has not asserted jurisdiction *provided* there is no interference with navigation.

33 C.F.R. § 332.4(g) (1978) (emphasis added).[38] The District Court found that

> [c]onstruction commenced on the Delta Pumping Plant . . . in July of 1963 and was sufficiently completed by

38. The superseded regulation, 33 C.F.R. 209.120(g)(12)(vii) (1977), was similar.

late 1967 so that the Delta Plant could begin diverting Delta water at that time. It was not until February of 1969, however, that all construction was finished.

400 F.Supp. at 620-21.

[27] Because the record on appeal does not reflect whether the pumping plant itself was completed prior to December 18, 1968, and the parties have not yet addressed the question, this question should first be considered by the District Court. At this time we express no opinion as to the validity of the Corps regulation. All such arguments should be presented in the first instance to the District Court. If the District Court finds that the Delta Pumping Plant was completed prior to December 18, 1968, the above regulation will exempt the State from obtaining an individual section 10 permit, provided that the facility does not interfere with navigation and so long as the regulation may be held to be a valid exercise of the Corps' authority.

VI. CONCLUSION

In summary, we hold that parties who suffer special injury have a private right of action to enforce compliance with the permit requirements of section 10. Sierra Club and the two individual appellees have standing to avail themselves this private right of action. We have already explained why, as to Friends of the Earth, the judgment was to be vacated and its complaint dismissed.

On the merits, the Tracy and Delta Pumping Plants fall within the ambit of section 10, since their operation has altered navigable waters of the United States. Because Congress affirmatively authorized the Tracy Pumping Plant, a Corps permit is not required for its present operational level. Therefore, we do not reach the question of whether an environmental impact statement is required for the

Tracy Plant. The Delta Pumping Plant, which has not been authorized by Congress, must obtain a Corps permit for its operation, unless exempted by the Corps regulation, 33 C.F.R. § 322.4(g) (1978).[39] To the District Court, we accord the discretion to allow the pumping to continue at its present level pending the filing and processing of the permit application. Traditional equitable principles apply. *Cf. Kleppe v. Sierra Club,* 427 U.S. 390, 407-08, 96 S.Ct. 2718, 49 L.Ed.2d 576 (1976); *Cady v. Morton,* 527 F.2d 786, 798 n.12 (9th Cir. 1975).

Affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

TANG, Circuit Judge, concurring:

One important aspect of this case concerns congressional authorization of the Tracy Pumping Plant. Specifically, we

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39. We vacate the District Court order that the Secretary of the Army, or his delegate, prepare an environmental impact statement prior to issuing a section 10 permit for either pumping plant. *See* 400 F.Supp. at 651. An environmental impact statement is not required at the present time.

It is true that, under our decisions, an environmental impact statement may be required before the Corps can lawfully issue a permit for the Delta Pumping Plant, since federal approval—be it in the form of a permit, license, or otherwise—that allows a project to proceed constitutes "a major federal action" within the meaning of section 102 of the National Environmental Policy Act, 42 U.S.C. § 4332 (1970). *Cady v. Morton,* 527 F.2d 786, 793 (9th Cir. 1975); *Scientists' Inst. for Public Information, Inc. v. Atomic Energy Comm'n,* 156 U.S.App.D.C. 395, 404-405, 481 F.2d 1079, 1088-89 (D.C.Cir. 1973); *Davis v. Morton,* 469 F.2d 593, 597 (10th Cir. 1972). At this time, however, to order the preparation of an environmental impact statement for the Delta Pumping Plant would be premature. *See Abbott Laboratories v. Gardner,* 387 U.S. 136, 148-49, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). Under Corps regulations, the District Engineer makes the initial determination of whether an alteration or modification of navigable waters will require an environmental impact statement. 33 C.F.R. § 325.4(b) (1978). We can see no justifiable reason, in this case, to depart from what we perceive to be an orderly procedure. Not until the Corps has made its decision should a party in a case such as this seek relief in the courts.

have concluded that Congress intended to authorize the Tracy Plant, and that the district court was in error when it concluded that the consent of Congress has not been obtained for the Plant's construction.

Our conclusion that the Tracy Pumping Plant was authorized by Congress rests in part upon our review of relevant appropriations measures which, when viewed in light of the entire record, evidence clear congressional consent to the Plant's construction and operation as mandated by Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403.

There may be some question that our holding in this case might conflict with this court's recent decision in *Libby Rod and Gun Club v. Poteat,* 594 F.2d 742 (9th Cir. 1979). As a member of the majority in *Libby,* it is important to point out distinguishing differences between this case and *Libby.*

I

Authorizing Legislation

A review of the relevant authorizing legislation addressing the Tracy Pumping Plant and the Libby Dam Project highlights the distinction between the two cases.

On appeal from the district court's ruling that a reregulating dam had not been authorized as required under 33 U.S.C. § 401, the Army Corps of Engineers (Corps) argued in *Libby* that the Flood Control Act of 1950 authorized both the main Libby Dam and a reregulating dam. Upon examination of the Flood Control Act, the court concluded that the sole reference to reregulation was contained in ¶ 165 of H.R.Doc.No. 521, 81st Cong., 2d Sess. (1950) which had been incorporated in the Act. That paragraph, the court held, did not explicitly authorize a reregulating dam —to the contrary, it noted that reregulation would be considered "when the need arises." *Libby Rod and Gun Club v.*

Poteat, 594 F.2d at 744. The court further concluded that this lone reference to reregulation could not be construed to authorize implicitly a reregulating dam, because: (1) it was not clear when the Flood Control Act was passed that a reregulating dam was necessary for the effective functioning of the main Libby Dam, and the Corps had cited no authority to support the proposition that a dam could be deemed authorized by necessity under 33 U.S.C. § 401; and (2) to imply authorization would frustrate the intent of Congress, evidenced in ¶ 165, to examine reregulation "when the need arises." Therefore, the court was not convinced that Congress intended to authorize a reregulating dam in the Flood Control Act.

The authorizing legislation in the instant appeal paints a different picture of congressional intent.

First, the Rivers and Harbors Act of 1937, ch. 832 § 2, 50 Stat. 844, reauthorized the entire Central Valley Project. (Opinion at ....., slip op. at 497.) In that authorization, Congress explicitly authorized, *inter alia,* pumping stations necessary to the effective functioning of that project. Rivers and Harbors Act of 1937, 50 Stat. at 850; (Opinion at ..... n.31, slip at 497.) Unlike *Libby* therefore the original authorizing legislation recognized the possible need for pumping stations and seemingly *authorized their construction* if they became necessary to the functioning of the entire project.

Second, the Reclamation Project Act of 1939, 43 U.S.C. § 485h(a), deemed as authorized any reclamation project that the Secretary of Interior found to be feasible, and that the Secretary had submitted a favorable report upon to the President and Congress. (Opinion at ....., slip op. at 497.) In 1947 the Secretary forwarded to the President and Congress a favorable feasibility report of the Central Val-

ley Project, which contained a detailed analysis of the Delta-Mendota Canal, one aspect of which is the Tracy Pumping Plant. (Opinion at ....., slip op. at 497.)

Unlike the Flood Control Act in *Libby,* the Reclamation Project Act was general legislation that allowed the Secretary of Interior to approve a project and the elements thereof, and such approval by the Secretary was deemed to represent authorization of the project.

Third, the Act of June 3, 1960, Pub.L.No. 86-488, 74 Stat. 156, authorized the construction of the San Luis Unit of the Central Valley Project. (Opinion at 29.) In that legislation, Congress explicitly "noted the precise location and plans of the Tracy Pumping Plant as a critical and integral part of the San Luis Unit project." (Opinion at ...., slip op. at 499.)

The importance of these three facts cannot be underestimated. First, Congress recognized the necessity of pumping plants in the Rivers and Harbors Act; second, it granted the Secretary of the Interior broad authority to authorize reclamation projects; and third, other authorization legislation specifically referred to the Tracy Pumping Plant. When these facts are examined in light of subsequent appropriations, a result different from *Libby* is mandated.

II

Appropriations

In *Libby,* this court was confronted by conflicting legal arguments. The Corps contended that appropriations measures should be equated automatically with project authorization. The Rod and Gun Club conversely argued under *T.V.A. v. Hill,* 437 U.S. 153, 98 S.Ct. 2279, 57 L.Ed.2d 117 (1978) that appropriations could never be equated with authorization.

This court adopted a middle view, concluding that appropriations should not be regarded as measures that either automatically authorized, or failed to authorize, a given project. This view was based in part on *T.V.A. v. Hill,* where the Court held that appropriation bills and substantive enactments of Congress were distinguishable:

> We recognize that both substantive enactments and appropriations measures are "Acts of Congress," but the latter have the limited and specific purpose of providing funds for authorized programs.

Id. at 190, 98 S.Ct. at 2299-2300.

Importantly, the panel in *Libby* did *not* hold that *T.V.A. v. Hill* mandated that appropriations could never be regarded as representing authorization. Rather, *Libby* merely recognized that an analysis of legislative history was required before a conclusion could be made as to the effect of a given appropriations measure.[1] Although *T.V.A. v. Hill* was certainly a distinguishable case on numerous grounds, its direct recognition of the difference between appropriations measures and substantive enactments transends the facts of that case. This point alone was relied upon in *Libby.*

The *Libby* court then proceeded to examine the facts of the case, and held that the appropriations for the reregulating dam could not be regarded as authorization. This conclusion was based on a combination of two factors: (1) the authorizing legislation not only failed to indicate that

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1. *Libby* did recognize, however, that appropriations measures and the committee reports accompanying such measures are to be scrutinized closely when it is argued that such measures represent substantive authorization. This view arises from both *T.V.A. v. Hill* and *SEC v. Sloan,* 436 U.S. 103, 98 S.Ct. 1702, 56 L.Ed.2d 148 (1978), where the Court has suggested that isolated remarks in committee reports and hearings are not to be regarded as necessarily representing the will of Congress as a whole.

a reregulating dam was contemplated as part of the Libby Dam project, but suggested as well that an analysis of the need for a second dam would be undertaken if the need for such a dam arose; and (2) there was strong evidence in the record that the Corps had misled appropriations committees by asserting to committee members that the reregulating dam had been specifically authorized by the Flood Control Act. *Libby,* 594 F.2d at 746. Confronted with such a legislative background, the court was reluctant to hold that the appropriations represented the will of Congress and could thus be equated with the consent required under § 401.

The facts here in *Sierra Club* are decidedly different. First, the Rivers and Harbors Act of 1937 recognized that pumping stations might be necessary to the effective functioning of the Central Valley Project, and thus implicitly authorized such stations. *See Pigeon River Co. v. Cox,* 291 U.S. 138, 159-60, 64 S.Ct. 361, 78 L.Ed. 695 (1934). The funding of what Congress recognized as possible necessary aspects of a project creates a situation different than that existing in *Libby,* and the appropriations, when viewed in light of this original authorizing legislation, can be reasonably regarded as authorizing the Tracy Pumping Plant by implication.

Second, the Secretary of the Interior was given general authority to authorize specific projects under the Reclamation Project Act of 1939. When the Secretary found the Central Valley Project feasible and submitted a favorable report to Congress, specific appropriations for the pumping station take on a significance not found in *Libby.* Indeed, these facts place *Sierra Club* directly under this court's rulings in *United States v. Kennedy,* 278 F.2d 121, 122 (9th Cir. 1960) and *Polson Logging Co. v. United States,* 160

F.2d 712, 714 (9th Cir. 1947). In these cases, the court determined that when a government official had been given general authority to condemn land for public uses, appropriations for specific parcels could be regarded as congressional authorization to acquire that land. The facts of *Sierra Club* seem highly analogous, because the Secretary was given general authority to authorize reclamation projects. Thus, appropriations for the Tracy plant can be regarded under *Kennedy* as authorization.

Third, the recognition of the Tracy Pumping Plant in the authorizing legislation for the San Luis Unit creates a strong inference that Congress believed it had authorized the Tracy Pumping Plant, and again appropriations, when viewed in light of this fact, can reasonably be regarded as supporting the conclusion that the pumping plant had been authorized. In *Libby,* the Corps argued similarly that the Water Resources Development Act implicitly recognized the existence of the reregulating dam, because the Act authorized generators for the reregulating dam. This claim was rejected, because the Water Resources Development Act authorized design studies only. However, the *Libby* court did note that had generators been authorized for the reregulating dam, a strong inference would have arisen that Congress intended to authorize the necessary structure in which the generators were to be placed, *i. e.,* the reregulating dam.

The recognition in the San Luis Unit authorization of the Tracy Pumping Plant as a critical and integral part of the San Luis Unit project creates the "strong inference" of intent to authorize that which was lacking in *Libby.* This inference, combined with specific appropriations for the Tracy Pumping Plant, satisfies me that Congress has consented to the construction and operation of the Tracy Pumping Plant.

A final point should be made. Both the majority in this case and Judge Kennedy in his dissent in *Libby* rely heavily upon *United States v. Arizona,* 295 U.S. 174, 55 S.Ct. 666, 79 L.Ed. 1371 (1935) and *Wisconsin v. Duluth,* 96 U.S. 379, 24 L.Ed. 668 (1877) for the proposition that appropriations should be equated with authorization.

I do not read either *United States v. Arizona* or *Wisconsin v. Duluth* as necessarily controlling. Both cases predate *T.V.A. v. Hill,* and to read either case as representing a decision by the Court that appropriations measures automatically represent authorization for purposes of the Rivers and Harbors Act of 1899 is suspect in light of that decision. However, the dictum in *United States v. Arizona* did suggest that Congress had appropriated money for a certain Laguna Dam Project "and so recognized and approved the building of the dam." *United States v. Arizona,* 295 U.S. at 186, 55 S.Ct. at 670.

It would appear unwise to me to read this dictum overly broadly. The facts in *Arizona* do not make clear the exact specifics of the Laguna Dam Project, and the Court might have been persuaded by any number of factors to conclude that the appropriations represented authorization. Because none of these factors are directly addressed in the Court's decision, the *Libby* majority thought it reasonable to distinguish the dictum and rely instead on an independent analysis of the facts of the *Libby* case.

In review, the facts of *Libby* and *Sierra Club* are distinguishable. *Libby* held that appropriations were to be analyzed closely in light of the facts of a given case. When the facts of *Sierra Club* are so analyzed, we have concluded that appropriations, when combined with the original legislation relating to the Tracy Pumping Plant, represented the consent of Congress mandated by 33 U.S.C. § 403.

Supreme Court, U. S.
FILED
FEB 13 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1252

STATE OF CALIFORNIA, *et al.*,
Petitioners,

vs.

SIERRA CLUB, *et al.*,
Respondents.

Supplemental Appendix to Petition for Writ of Certiorari

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Supplemental Appendix

400 Federal Supplement 610

SIERRA CLUB, a non-profit California Corporation, et al., Plaintiffs,

v.

Rogers C. B. MORTON, as Secretary of the Interior of the United States, et al., Defendants.

No. C-71-500-CBR.

United States District Court, N. D. California.

July 28, 1975.

John B. Clark, Pettit, Evers & Martin, San Francisco, Cal., for plaintiffs Sierra Club, Friends of the Earth and Hank Schramm.

Michael R. Sherwood, San Francisco, Cal., Sierra Club Legal Defense Fund, for plaintiff Sierra Club.

Gary J. Near, San Francisco, Cal., for plaintiffs Friends of the Earth and William Dixon.

James L. Browning, Jr., U. S. Atty., Francis Boone, Richard J. Dauber, Asst. U. S. Attys., San Francisco, Cal., for federal defendants.

Evelle J. Younger, Atty. Gen., Carl Boronkay, R. H. Connett, Bertram G. Buzzini, Deputy Attys. Gen., Sacramento, Cal., for state defendants.

Victor E. Gleason, Los Angeles, Cal., for intervening defendant Metropolitan Water District of Southern California.

James G. McCain, Corcoran, Cal., for intervening defendant Tulare Lake Basin Storage District.

Albert Thomas Henley, San Jose, Cal., and Daniel F. Gellery, Sacramento, Cal., for intervening defendant Santa Clara Water District.

MEMORANDUM OF OPINION

RENFREW, District Judge.

In 1971 two environmental groups and two individuals brought this action to contest the allegedly unlawful construction and operation of three major facilities of the California Water Project. The parties agreed to bifurcate the trial of the action into a liability phase and a relief phase. The liability phase was tried to the Court between June 10, 1974, and June 21, 1974. Subsequently, on July 26, 1974, the Court heard oral argument and at the conclusion of that argument informed the parties of its views as are more fully set forth herein.

The California Water Project has been constructed in part as a response to California's water problem. The essence of that problem is the need to redistribute the state's plentiful water supply from water-abundant areas to water-deficient areas. The water-rich areas lie in the North and West Central portion of the state. Water from these areas flows through a system of rivers and channels to the Sacramento-San Joaquin Delta ("Delta") and finally through the San Francisco Bay to the Pacific Ocean. One proposed solution to the state's water problem is transporting the excess water, which would normally flow into the ocean, to the arid or semi-arid areas of the state. A second and interrelated problem arises because the excess water is present in and flows out of the water-rich areas only during certain times of the year. Because the demand for water consumption for human use is relatively constant throughout the year and the agricultural demand varies

during different times of the year, water which accumulates in the water-rich areas during the excess water seasons must be stored for use during the year if these demands are to be met.

A brief description of the geographical area underlying the subject matter of this suit will aid in understanding the facts of this case. The Delta is a roughly triangular-shaped region which runs southwest from Sacramento west of the Sacramento River to Antioch, which forms one corner of the triangle. It then runs southeast from Antioch to a point approximately 10½ miles southeast of Tracy, which forms a second corner. Finally, it runs north from that point through Stockton to Sacramento, completing the triangle. Clifton Court Forebay, Delta Pumping Plant, and Tracy Pumping Plant are located on the edge of the Delta approximately half-way between Antioch and Tracy. The proposed route of the Peripheral Canal runs from the intake structure in the north Delta, south through the east Delta, and finally turns to the southwest, stopping between the Tracy Pumping Plant and the Clifton Court Forebay. In the southern Delta the San Joaquin River and its tributaries flow basically in a northwesterly direction while in the northern Delta the Sacramento River and its tributaries flow in a southwestern direction.[1]

The California Water Project consists of both state and federal facilities. The federal component of the project is administered by the United States Bureau of Reclamation and is designated as the Central Valley Project. The state component of the project is administered by the Department of Water Resources, a department within the Resources Agency of the State of California, and is designated as the State Water Project.

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1. See the map of the Delta attached hereto as Exhibit A.

The Central Valley Project, the federal project, consists of a series of reservoirs, pumping plants, canals, and other facilities designed to control the flow of water in the Sacramento River, San Joaquin River, and certain of their tributaries, generate hydroelectric power, provide flood control, and provide water for irrigation and other uses in the Central Valley of California. One of the principal facilities of the Central Valley Project is the Tracy Pumping Plant, located on an inlet channel of Old River in the Delta. The Tracy Pumping Plant diverts water from the Delta by pumping it into the Delta-Mendota Canal, a 115-mile canal which leads to the Mendota Pool in the Central Valley.

The State Water Project, created by the Burns-Porter Act of 1959, was to consist of a system of dams, canals, pumping plants, and other facilities designed to transfer water across the Delta, provide for water conservation and flood and salinity control in the Delta, provide for the generation of power, and provide transfer water from points at or near the Delta to the San Francisco Bay Area, the San Joaquin Valley, the Central Coast, and Southern California. The Burns-Porter Act was submitted to and approved by California voters on November 8, 1960.

Substantially all of the water required annually by the State Water Project is to be obtained initially from the Sacramento and San Joaquin Rivers and their tributaries. Among the facilities constructed for this purpose are the Delta Pumping Plant and the Clifton Court Forebay which are located on the edge of the Delta. A majority of the water that is transported from Northern California to Southern and Central California travels through the Delta Pumping Plant and the California Aqueduct.

The State of California through its Department of Water Resources has entered into contracts providing that at

some point in the future it deliver 4.23 million acre-feet of water annually by means of the State Water Project. The primary purchasers of water are the Kern County Water Agency, which has agreed to purchase 1,153,400 acre-feet annually, and the Metropolitan Water District of Southern California, which has agreed to purchase 2,011,500 acre-feet annually. It is expected that over 95% of the water which the State is contractually obligated to deliver to Central and Southern California will be transmitted through the Delta Pumping Plant.

Many controversies have been associated with the continuing development of this massive water project. This case, however, concerns the extent to which the decisions and actions of state and federal defendants must take into account navigational, environmental, fish, and wildlife considerations. The Delta, consisting of approximately 700 miles of meandering waterways, some of which are navigable, is used for both commercial shipping and recreational boating. Water skiing and houseboating are common activities in this region and there are many marinas within its confines. A significant amount of California warm water fishing, anadromous sport fishing, and approximately 80% of the commercial salmon fishing is dependent upon the environment in the Delta. Moreover, this region and its adjoining marshlands and wetlands are on the Pacific Flyway, an important wintering area and major and customary natural habitat for migratory waterfowl.

Plaintiffs in this case are The Sierra Club, Friends of the Earth, Hank Schramm, and William Dixon. The Sierra Club is a nonprofit California corporation having in excess of 130,000 members of whom more than 40 000 live in the San Francisco Bay and the Sacramento-San Joaquin Delta areas. Included in the membership of the Sierra

Club are many persons who use the waters referred to in the complaint for recreational purposes, including, but not limited to, boating, fishing and swimming. The stated purposes of the Sierra Club include the preservation and conservation of the natural resources, fish, and wildlife of the United States, including its rivers, bays, wetlands, deltas, and estauarine areas.

Friends of the Earth is a nonprofit New York corporation which has its principal place of business in San Francisco. Its stated purposes include the preservation, restoration, and rational use of the environment.

Hank Schramm is and has been engaged for the past 20 years in the business of commercial fishing and the operation of sports fishing party boats in the San Francisco Bay and the Pacific Ocean. Schramm has a economic interest in this controversy since he depends for his livelihood on the maintenance, preservation, and conservation of sports and commercial fisheries in the San Francisco Bay and the adjoining waters of the Pacific Ocean.

William Dixon owns substantial property in the Delta, including a partnership interest in the St. Germain Duck Club on Simmons Island, and consequently has an economic interest in the maintenance, preservation, and conservation of adequate non-polluted supplies of water in the Delta and San Francisco Bay regions.

Defendants are state and federal officials who administer the various agencies responsible for overseeing the operation, construction, and regulation of the facilities in question. The federal defendants are Rogers C. B. Morton, Secretary of the Interior; Gilbert Stamm, Commissioner of the Bureau of Reclamation; Howard H. Calloway, Secretary of the Army; William C. Gribble, Jr., Chief of Engineers of the United States Army; George B. Fink,

Division Engineer of the South Pacific Division of the United States Army Corps of Engineers; Colonel Frederick J. Rockwell, District Engineer of the Sacramento, California District of the United States Army Corps of Engineers; and Colonel James L. Lammie, District Engineer for the San Francisco, California District of the United States Army Corps of Engineers. The state defendants are Norman B. Livermore, Jr., Secretary for Resources, and John R. Teerink, Director of the Department of Water Resources.[2]

[1] Plaintiffs' amended complaint alleged six claims for relief, namely, failure of defendants to comply with Sections 9 and 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401, 403 (first claim); Section 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 407 (second claim); Sections 2 and 3 of the Fish and Wildlife Coordination Act, 16 U.S.C. §§ 662, 663 (third claim); Sections 101 and 102 of the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4331, 4332 (fourth claim); the Estuarine Areas Act and the Federal Water Pollution Control Act, 16 U.S.C. § 1221 *et seq.* and 33 U.S.C. § 1151 *et seq.* (fifth claim); and the California Environmental Quality Act, California Public Resources Code § 21000 *et seq.* (sixth claim). In the pretrial order plaintiffs abandoned their second claim. Since the parties have at best cursorily asserted and argued with respect to the fifth claim, and since plaintiffs have offered neither findings nor conclusions with respect to that claim

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2. For the purposes of this Memorandum of Opinion, defendants are named as they appeared in the Agreed Pre-Trial Order. The Court notes that all of the named defendants were sued in their official capacities and thus, even though some of those originally named no longer occupy those positions, by virtue of Rule 25(d)(1) of the Federal Rules of Civil Procedure their successors are deemed automatically substituted.

and none of the trial testimony or exhibits were directed toward that claim, the Court considers the fifth claim to have been abandoned at trial and does not discuss it in this Memorandum of Opinion.

The heart of this phase of the controversy is the legality and operation of the Tracy and Delta Pumping Plants and the proposed construction and operation of the Peripheral Canal.

I. FACTUAL BACKGROUND

A. *The Tracy Pumping Plant*

Construction began on the Tracy Pumping Plant ("Tracy Plant") in 1947 and was sufficiently completed by June 11, 1951, so that the facility could commence initial operation. The Tracy Plant was built by the Bureau of Reclamation at a point approximately two miles from the Old River and one mile south of the Clifton Court Tract. While the Tracy Plant was being constructed an intake channel was simultaneously constructed from the pumping plant northeast to Old River. The Tracy Plant consists of six pumps with a maximum pumping capacity of 4602 cubic feet per second ("cfs") which lift the water supplied through the intake channel into the Delta-Mendota Canal. The Delta-Mendota Canal is the conduit through which federal water is transported to the Central Valley.

B. *The Delta Pumping Plant*

Construction commenced on the Delta Pumping Plant ("Delta Plant") in July of 1963 and was sufficiently completed by late 1967 so that the Delta Plant could begin diverting Delta water at that time. It was not until February of 1969, however, that all construction was finished.

The Delta Plant is approximately two miles southwest of the end of Italian Slough, an inlet off Old River. Originally water exported by the Delta Plant was transported through an intake channel connecting the Delta Plant with Italian Slough. The construction of this intake channel required the State to cut through the levee of the slough. The Delta Plant presently has seven pumping units with a combined capacity of 6300 cfs[3] which lift Delta water into the California Aqueduct. However, there is room for the installation of four additional pumping units which would increase capacity to 10,300 cfs,[4] and it is contemplated that at least the first of these pumps will be operational by 1980.

In order to obtain the ability to confine pumping to off-peak electrical hours, the State acquired the Clifton Court Tract and in December of 1967 commenced construction of the facility which is an artificial body of water known as Clifton Court Forebay. Construction of this Forebay involved the excavation of land and the building of dikes or levees inside the existing levees which shielded Clifton Court Tract from Italian Slough, West Canal, and Old River. When the Forebay became operational in November of 1969, the end of the Italian Slough intake channel was closed, and the remainder of the channel was connected to the Forebay, thus creating the intake channel for the Delta Plant. The Forebay diverts water from the Delta through an intake structure consisting of five radial gates which connects the Forebay to West Canal. West Canal in turn is connected to Old River.

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3. Stated in other terms, the Delta Plant currently has the capacity to pump 12,600 acre-feet of water per day.

4. If a pumping plant pumps at the rate of 1 cfs for 24 hours, it will pump 1.98 acre-feet per day.

C. *The Peripheral Canal*

The State of California proposes to finance, construct, and operate a 42-mile canal, known as the Peripheral Canal, from a point near Hood, California, on the Sacramento River to a point near the headworks of Clifton Court Forebay and the intake channel for the Tracy Plant. The Peripheral Canal is designed to permit the State to transport high quality fresh water to the Delta and Tracy Plants by diverting water from a point on the Sacramento River upstream from both the point of salt water intrusion and the point where poorer quality water from the San Joaquin River joins the Sacramento River in order to insure that saline or poorer quality water from the Delta does not enter the pumps of the Delta or Tracy Plants. The Peripheral Canal is designed to provide sufficient quantities of water to the Delta and Tracy Plants so as to satisfy the present and future requirements of the California Water Project, to provide water quality control, and to improve fish and wildlife and recreation potentials in the Delta.

As presently proposed, the Peripheral Canal will be 30 feet deep, have a base width of approximately 200 feet, have a top width of between 400 and 500 feet, and have an anticipated capacity of approximately 23,000 cfs. This maximum capacity would be allocated in the following manner: 10,300 cfs would be allocated to the State Water Project facilities served by the Delta Plant, 6,500 cfs would be available to the Federal Central Valley Project,[5] and 6,000 cfs would be available for release into the Delta along the path of the Peripheral Canal. Although one witness estimated that the entire Peripheral Canal project would cost $240 million, inflationary forces could easily result in a much higher cost.

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5. It is not clear from the testimony how much of this figure would be available for pumping through the Tracy Plant.

II. RIVERS AND HARBORS ACT OF 1899

A. *Private Right of Action*

[2-5] In determining whether a private right of action is implicit in a statute not expressly providing one, four factors are relevant: (1) Is the plaintiff one of the class for whose especial benefit the statute was enacted; (2) Is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one; (3) Is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff; and (4) Is the cause of action one traditionally relegated to state law, in an area basically the concern of the states, so that it would be inappropriate to infer a cause of action based solely on federal law? *Cort v. Ash,* 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975). *See Securities Investor Protection Corp. v. Barbour,* 421 U.S. 412, 95 S.Ct. 1733, 44 L.Ed.2d 263 (1975); *National Railroad Passenger Corp. v. National Ass'n of Railroad Passengers,* 414 U.S. 453, 457-458, 94 S.Ct. 690, 38 L.Ed.2d 646 (1974) (hereafter *Amtrak*). *But cf. Stewart v. Travelers Corp.,* 503 F.2d 108, 110-111 n. 7 (9th Cir. 1974). Private rights of action are based on a public policy of allowing injured parties to obtain civil redress for injuries resulting from the violation of statutorily imposed duties where the maintenance of such actions would effectuate the purposes intended to be served by the Act and would not interfere with the operation of the statutory scheme. While the courts that have considered the issue have expressed diverse views,[6] the Court of Appeals in this Circuit has held *sub silentio* that a private right of action exists under Sections 9 and 10. *Alameda Conser-*

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6. The Court of Appeals for the Third Circuit has held that governmental enforcement is exclusive and that Congress did not

vation Association v. California, 437 F.2d 1087, 1094-1095 (9th Cir. 1971); *Sierra Club v. Leslie Salt Co.,* 354 F.Supp. 1099, 1104-1105 (N.D.Cal. 1972). In *Alameda Conservation* plaintiffs sought injunctive relief against defendant corporation alleging injury arising out of defendant's violation of Sections 9 and 10. The court, after concluding that all of the individual plaintiffs (but not the association) had standing to sue, reversed the district court's dismissal. Although the court did not explicitly discuss the question of whether a private right of action existed, it would not have reversed the district court's dismissal of the action unless it had so ruled *sub silentio.*[7] Moreover, in *Cort v. Ash, supra,* 95 S.Ct.

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create any civil cause of action in favor of private parties injured by any violation of the Act. *Red Star Towing and Transportation Co. v. Department of Transportation,* 423 F.2d 104, 106 (3d Cir. 1970). *See Hooper v. United States,* 331 F.Supp. 1056, 1058 (D. Conn. 1971). *Guthrie v. Alabama By-Products Co.,* 328 F.Supp. 1140, 1148 (N.D.Ala. 1971), *aff'd.,* 456 F.2d 1294 (5th Cir. 1972), merely holds that although Section 13 of the Rivers and Harbors Act may create a federally proteced right against deposit of refuse which injures navigation or anchorage, the injury of other private rights, even from deposits in violation of Section 13, does not give rise to a federal right of action nor does it supply a basis of federal jurisdiction. The crux of that decision was the court's belief that Section 13 was not enacted for the purpose or with the effect of creating a federal cause of action to protect riparian landowners from the kinds of water pollution that have traditionally been dealt with under the law of nuisance. *Ibid.,* at 1145. There the court simply did not find the plaintiffs within the class of persons for whose benefit the statute was enacted. *Bass Anglers Sportsman's Society v. Scholze Tannery, Inc.,* 329 F.Supp. 339, 348-349 (E.D. Tenn. 1971), and *Bass Angler Sportsman Society v. United States Steel Corp.,* 324 F.Supp. 412, 416 (N.D.M.D. and S.D.Ala.), *aff'd., sub nom. Bass Anglers Sportsman Society v. Koppers Co.,* 447 F.2d 1304 (5th Cir. 1971), at best hold that no private right of action exists under Section 13 to redress public injuries. In fact, the Fifth Circuit has held that there exists a private right of action to redress specific injuries. *Neches Canal Co. v. Miller & Vidor Lumber Co.,* 24 F.2d 763, 765 (5th Cir. 1928).

7. Standing concerns whether a particular plaintiff is sufficiently connected with a cause of action to assert rights thereunder in a legal proceding. Clearly, before a court can rule on the question of standing, there must be a determination that a private right of action exists. See *Amtrak, supra,* 414 U.S. at 456, 94 S.Ct. 690.

2080, the Supreme Court apparently construed *Wyandotte Transportation Co. v. United States,* 389 U.S. 191, 201-202, 88 S.Ct. 379, 19 L.Ed.2d 407 (1967), as recognizing the existence of a private right of action under the Rivers and Harbors Act of 1899, albeit under a different section of the Act. Finally, analysis of the Rivers and Harbors Act of 1899 in light of *Cort v. Ash* also leads the Court to conclude that a private right of action exists under Sections 9 and 10.

[6, 7] First, the Court concludes that plaintiffs are members of the class for whose especial benefit the statute was enacted. Sections 9 and 10 were enacted both to prevent injuries to private parties as a result of obstructions to navigable capacity which were not authorized by the United States and to allow the United States to regulate obstructions to the navigable capacity of its navigable waterways.[8]

[8, 9] Second, the Court concludes that there is no indication that it was the intent of Congress to preclude a private right of action.[9] In reaching this conclusion, the primary consideration is the significance of the provisions empowering the Attorney General to enforce the Act in appropriate

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8. Prior to its enactment the Supreme Court in *Willamette Iron Bridge Co. v. Hatch,* 125 U.S. 1, 8, 8 S.Ct. 811, 31 L.Ed. 629 (1888), held that there was no common law of the United States which prohibited obstructions and nuisances in navigable rivers. In that case a *private party* had obtained an injunction against the construction of a bridge over the Willamette River. Because the Court found that there was no federal common law prohibiting such a bridge and that the act admitting Oregon into the Union also did not prohibit such a bridge, it reversed the decision of the trial court and ordered the suit dismissed. It was in response to this case that Congress enacted the Rivers and Harbors Act. This Court believes this is clear evidence that the Rivers and Harbors Act was enacted to benefit those persons who are specifically injured by an unlawful obstruction to navigable capacity.

9. The Court notes that it has not found and the parties have not cited any authorities which indicate a congressional intent to create a private right of action, with the exception of the above analysis of *Willamette Iron Bridge Co. v. Hatch.*

proceedings. Preliminarily, the Court notes that the doctrine of *expressio unius est exclusio alterius,* recently given vitality in two United States Supreme Court decisions, has been held to be inapplicable to the Rivers and Harbors Act of 1899. *Wyandotte Transportation Co. v. United States, supra,* 389 U.S. at 200-204, 88 S.Ct. 379.[10] That being so, the only question is whether there is anything in the Act or the statutory scheme which indicates that Congress intended to vest exclusively in the Attorney General the enforcement of the Act. Section 12, 33 U.S.C. § 406, makes violation of Sections 9 and 10 a misdemeanor punishable by fine or imprisonment and further provides that:

> "* * * the removal of any structures or parts of structures erected in violation of the provisions of the said sections may be enforced by the injunction of any district court exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States."

This section grants jurisdiction to the district court to enforce by injunction removal of structures erected in violation

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10. In *Barbour* and *Amtrak* the court adopted the proposition that express statutory provision for one form of proceeding ordinarily implies that no other means of enforcement was intended by the legislature. *Securities Investor Protection Corp. v. Barbour, supra,* 95 S.Ct. 1733; *Amtrak, supra,* 411 U.S. at 458, 94 S.Ct. 690. The court further stated that that implication would yield, however, to clear contrary evidence of legislative intent as found in the legislative history and in the overall structure of the Act. This principle is no barrier in the instant case in view of the holding of the Supreme Court that the remedies specified in the Rivers and Harbors Act of 1899 are not exclusive. *See Wynadotte Transportation Co. v. United States, supra,* 389 U.S. at 200-201, 88 S.Ct. 379. In that case the court recognized that to limit the government to remedies explicitly authorized under the Act would withhold remedies that would ensure the effectiveness of the Act. The court was not prepared to impute to Congress a futility inconsistent with the great design of the legislation.

of Sections 9 and 10. It further grants power to the Attorney General to institute such injunctive proceedings. Neither of these grants rise to the level of an express prohibition against private suits. Moreover, the first jurisdictional grant would seem to encompass all injunctive suits, both private and governmental. In a case involving a somewhat analogous statutory scheme, the United States Supreme Court held that a provision for enforcement by the Attorney General did not preclude a private right of action. See *Allen v. State Board of Elections,* 393 U.S. 544, 554-557, 89 S.Ct. 817, 22 L.Ed.2d 1 (1969).[11] In view of that case and because the Court believes that a private right of action is necessary to effectuate the purposes intended to be served by the Act, the Court cannot find, either expressly or impliedly, in Section 12 of the Rivers and Harbors Act any exclusive vestment of enforcement powers in the Attorney General. The Court does note that Section 17 provides, *inter alia,* that the Department of Justice "shall conduct the legal proceedings necessary to enforce" Sections 9 and

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11. In *Allen v. State Board of Elections,* a similar statute was before the court. There 42 U.S.C. § 1973j(f) provided that the district courts would have jurisdiction over proceedings brought pursuant to that section of the Voting Rights Act of 1965. Another subsection of that same section of the statute provided that the Attorney General may bring actions for preventive relief whenever any person engaged in acts prohibited by certain sections of the Voting Rights Act. 42 U.S.C. § 1973j(d). Notwithstanding this explicit grant of power to the Attorney General, the court found that enforcement of the Voting Rights Act was not vested exclusively in him and held that a private right of action existed under Section 5 of the Voting Rights Act. In the instant case these two grants of power (*i. e.,* jurisdiction in the district court and power to enforce on the part of the Attorney General) are found in two separate clauses in one sentence rather than in two separate subsections of a statutory provision as in *Allen.*

10.[12] In light of the language of that entire section, however, the Court believes that Section 17 merely creates a duty of enforcement in the Justice Department and vests exclusive enforcement of the criminal provisions in that department. Accordingly, the Court concludes that nothing in the Act precludes private suits to redress injury to private persons due to violations of the Act.[13]

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12. Section 17 provides:

"The Department of Justice shall conduct the legal proceedings necessary to enforce the provisions of sections 401, 403, 404, 406, 407, 408, 409, 411, 549, 686, and 687 of this title; and it shall be the duty of United States attorneys to vigorously prosecute all offenders against the same whenever requested to do so by the Secretary of the Army or by any of the official hereinafter designated, and it shall furthermore be the duty of said United States Attorneys to report to the Attorney General of the United States the action taken by him against such offenders so reported, and a transcript of such reports shall be transmitted to the Secretary of the Army by the Attorney General; and for the better enforcement of the said provisions and to facilitate the detection and bringing to punshment of such offenders, the officers and agents of the United States in charge of river and harbor improvements, and the assistant engineers and inspectors employed under them by authority of the Secretary of the Army, and the United States collectors of customs and other revenue officers shall have power and authority to swear out process, and to arrest and take into custody, with or without process, any person or persons who may commit any of the acts or offenses prohibited by the said sections, or who may violate any of the provisions of the same: *Provided*, That no person shall be arrested without process for any offense not committed in the presence of some one of the aforesaid officials; *and provided further*, That whenever any arrest is made under such sections, the person so arrested shall be brought forthwith before a commissioner, judge, or court of the United States for examination of the offenses alleged against him; and such commissioner, judge, or court shall proceed in respect thereto as authorized by law in case of crimes against the United States." 33 U.S.C. § 413.

13. The Court agrees that Congress intended to vest exclusive enforcement in the Attorney General of suits to redress public injuries due to violations of the Act. In the case of public injuries, Congress may have felt that no citizen should substitute his judgment for that of the government as to when the public interest required civil relief.

[10] Third, the Court concludes that allowance of a private right of action where a plaintiff alleges he has been specifically injured by a violation of Sections 9 and 10 is necessary to effectuate the purposes intended to be served by the Rivers and Harbors Act of 1899 and hence is consistent with the underlying purposes of the legislative scheme. Although the Attorney General can bring civil suits to redress such injuries, he has neither the time, staff, nor incentive to see that all injuries caused by violations of the Act are redressed. As in *Allen v. State Board of Elections, supra,* 393 U.S. 544, 89 S.Ct. 817, implication of a private right of action is necessary or the Rivers and Harbors Act of 1899 will become practically unenforceable against specific injuries to private parties. Accordingly, the Court concludes that implication of a private right of action under Sections 9 and 10 would be consistent with the broad purposes of the Act.[14]

[11, 12] Finally, although it might be remotely possible[15] for the plaintiffs to bring a common law nuisance

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14. The instant case is unlike *Barbour* where Congress created a corporate entity to solve a public problem and then provided for substantial supervision of its operations by an agency charged with the protection of the public interest (*i. e.,* the S.E.C.). It is also unlike *Amtrak* where the legislative intent and the statute itself clearly indicated that Congress was conferring private right of action only on a limited class of private parties (*i. e.,* employees who were the beneficiaries of certain labor agreements). Additionally, by allowing a private action in *Wisconsin v. Illinois,* 278 U.S. 367, 49 S.Ct. 163, 73 L.Ed. 426 (1929), albeit by a state, the Supreme Court has at least *sub silentio* recognized the existence of a private right of action under Section 10.

15. It is not at all clear to the Court that a common law nuisance suit to redress the type of injuries alleged by plaintiffs in the instant case would be cognizable in state court. Traditionally suits of this nature could only be brought to redress injuries to property interests and hence the availability of a common law nuisance suit may be severely restricted in many cases. W. Prosser, *The Law of Torts,* § 89 (4th Ed. 1971). Although California appears to have adopted a more liberal rule, *e. g.,* 36 Cal.Jur.2d, *Nuisances* § 30

suit in state court against the defendants, the Court concludes the instant case is not the type of action which is traditionally relegated to state law in an area basically the concern of the states. There is a federal interest in protecting persons from injuries resulting from unauthorized obstructions to the navigable capacity of navigable waters of the United States and possible federal intrusion into the area of state nuisance law is necessary so that the federal interest asserted here will not be compromised by contrary state law. *Cort v. Ash* is distinguishable as in that case the interest which plaintiff sought to vindicate (*i. e.*, breach of fiduciary duty by corporate directors arising out of an *ulta vires* expenditure of corporate funds) was not the federal interest (*i. e.*, dulling the impact of corporations on federal elections) which Congress had intended to protect when it enacted the Federal Election Campaign Act. *Cort v. Ash, supra,* 95 S.Ct. 2080. Accordingly, the Court concludes that the test established in *Cort v. Ash* requires the finding of a private right of action under Sections 9 and 10 of the Rivers and Harbors Act of 1899.[16]

(1957), which might conceivedly cover the instant factual situation, the Court need not determine the scope of California nuisance law, as the key factor here is that any possible federal intrusion in to the area of state nuisance law is necessary and proper to vindicate plaintiffs' federal rights.

16. Federal defendants' reliance on *Amtrak, supra,* 414 U.S. 453, 94 S.Ct. 690, is inapposite. In that case the legislative history expressed a clear intent to exclude private suits, except as to certain cases, involving labor agreements where private suits were expressly authorized. 414 U.S. at 457-465, 94 S.Ct. 690. Nor does *Connecticut Action Now, Inc. v. Roberts Plating Co.,* 457 F.2d 81 (2d Cir. 1972), support federal defendants' position. In that case the court held an individual may not sue on behalf of the public for general injuries caused by violations of the Rivers and Harbors Act of 1899. The court expressly reserved the question decided here, whether a private claimant specifically injured by a violation may sue for an injunction or damages. 457 F.2d at 89, 90 n. 16 See *James River &*

B. *The Merits of the Claim*

Plaintiffs' first claim is that the construction and present operation of the Tracy and Deltta Plants and the proposed construction of the Peripheral Canal, in the absence of the proper authorization, are in violation of Sections 9 and 10 of the Rivers and Harbors Act of 1899. 33 U.S.C. §§ 401, 403. The Court must determine whether the construction and operation of any of the three structures requires authorization pursuant to Sections 9 and 10, and if such authorization is or was required as to any of the structures, whether statutorily sufficient authorization was obtained.

1. *Section 9*

Section 9 provides that it shall be unlawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any navigable water until (1) the consent of Congress to such construction has been obtained, and (2) the plans for such construction have been approved by the Chief of Engineers and the Secretary of the Army. That section contains a proviso to the effect that state authorization may replace Congressional consent in the case of waterways whose navigable portions lie wholly within the boundaries of a single state. However, even in that case, approvals by the Chief of Engineers and by the Secretary of the Army are still required.[17]

Kanawha Canal Parks, Inc. v. Richmond Metropolitan Authority, 359 F.Supp. 611, 638-640 (E.D.Va.), *aff'd.*, 481 F.2d 1280 (4th Cir. 1973), for a well-reasoned decision in support of the result reached here. Because this action is one brought not on behalf of the public but rather by private plaintiffs who allege specific injuries to themselves, the Court concludes that a private right of action exists in the present case.

17. 33 U.S.C. § 401 provides:

"It shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any

[13] With respect to the Peripheral Canal, it is clear that Section 9 authorization will be required before any party commences building the Canal as it is presently proposed. At the point where the Canal crosses the Middle River, the Canal will result in the complete damming of the river. Furthermore, there is presently no provision for the passage of boats past the Canal at this location. Such a closure of the Middle River will constitute the building of a "dike" within the meaning of Section 9. In *Citizens Committee for the Hudson Valley v. Volpe,* 302 F.Supp. 1083, 1089 (S.D.N.Y. 1969), *aff'd.,* 425 F.2d 97 (2d Cir. 1970), the court held that the word "dike" should be defined in accordance with its ordinary meaning. The court found that dike meant, *inter alia,* "[a]n embankment for controlling or holding back the waters of the sea or a river". 302 F.Supp. at 1089. The Court notes that "dam" is defined as "a barrier preventing the flow of water". Webster's Third New International Dictionary, p. 571 (1971). Hence, even though the closure of Middle River will be caused by

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port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of the Army: *Provided,* That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of the Army before construction is commenced: *And provided further,* That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of the Army, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of the Army."

a structure denoted as a "canal", because that structure will have the effect of a "dam" or "dike", the Court finds that the Peripheral Canal is the type of structure regulated by Section 9. Because the Peripheral Canal will clearly be "in" the Middle River, the only issue remaining is whether Section 9 prohibits any dikes or only those dikes which obstruct navigation. Although the legislative intent underlying the enactment of Section 9 may well have been to prohibit unreasonable obstructions to navigable waters, it seems likely that Congress used the word "any" in Section 9 in order to reserve the right to determine whether a given structure created an unreasonable obstruction. Because the Peripheral Canal will obstruct nagivation on the Middle River, however, either construction of Section 9 will include the Canal within the section's regulatory prohibitions. *Citizens Committee for the Hudson Valley v. Volpe, supra,* 302 F.Supp. at 1089. *But cf. Petterson v. Resor,* 331 F.Supp. 1302, 1306 (D.Ore. 1971).

With regard to the type of authorization required, since the navigable waters which the Peripheral Canal will obstruct are all wholly within California, Congressional consent is not necessary as long as the Canal is authorized by the California State Legislature. It is not clear to the Court whether the passage of the Burns-Porter Act constitutes such authorization, as that Act did not specifically envision the Peripheral Canal. Because no evidence was adduced at trial as to whether the legislature has subsequently authorized the construction of the Canal, the Court merely holds that such authorization must be obtained prior to the commencement of construction. Moreover, defendants must obtain a Section 9 permit from the Corps of Engineers and the Department of the Army prior to construction.

[14, 15] With respect to the Delta and Tracy Plants, plaintiffs argue that various components of these facilities

constitute the type of structures regulated by Section 9. Most of these components, however, are clearly not "over or in" any of the navigable waters in question, and those few components which arguably are "over or in" navigable waters are not the type of structure regulated by Section 9. Both of the main pumping plants of the Tracy and Delta Plants are at least two miles distant from any navigable waters and are connected thereto only through the construction of certain man-made inlet channels. The only components which would be said to be "over or in" navigable waters are the headworks and fish protective facilities of the Tracy Plant.[18] However, these components are not a "bridge, dam, dike, or causeway".[19] Accordingly, neither the construction of the Tracy or Delta Plants nor of any of their component structures was unlawful with respect to Section 9.

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18. The headworks and fish protective facilities of the Delta Plant are not "over or in" navigable water because they are set back on a small inlet constructed by the state defendants off West Canal.

19. The Court need not decide whether the Tracy Plant headworks or fish protective facility is "over or in" navigable waters, as neither structure fits within the definitions of any of the structures enumerated in Section 9. Clearly neither is either a "dam" or a "dike" as defined, *supra,* since neither is "an embankment for controlling or holding back the waters of the sea or a river" or is "a barrier preventing the flow of water". They also are not causeways, as neither is "a raised road across water or marshy land with water or marshy land on both sides of the road". *Citizens Committee for the Hudson Valley v. Volpe, supra,* 302 F.Supp. at 1089. Finally, neither structure is a bridge as neither is "a structure erected over a depression or obstacle to travel (as a river, chasm, roadway, or railroad) carrying a continuous pathway or roadway (as for pedestrians, automobiles, or trains)." Webster's Third New International Dictionary, p. 276 (1971). The scope of Section 10 of the Rivers and Harbors Act of 1899 is substantially broader than the proscriptions of Section 9 as the latter section regulates only several specific types of structures while the former section utilizes very general language so as to include within its proscriptions both certain specific structures and any structure which has the effect of obstructing navigable capacity.

2. *Section 10*

Section 10 contains three proscriptive clauses. The first clause prohibits the creation of any obstruction to navigable capacity not affirmatively authorized by Congress. The second clause makes it unlawful to build or commence the building of certain structures except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army. Finally, the third clause makes it unlawful to alter or modify in any manner the condition or capacity of the channel of any navigable water unless such alterations or modifications are recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.[20]

a. *Scope of Section 10*

[16-19] In determining whether Section 10 requires authorization of the three structures involved in this case, the Court confronts two threshold questions concerning the coverage of that section. First, defendants contend that because certain of these structures are not located over or

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20. 33 U.S.C. § 403 provides:

"The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any maner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel or any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same."

in any navigable water, they are not within the ambit of Section 10. This contention is without merit. It is clearly established that Section 10 does not require the existence of an obstruction over or in navigable waters. *United States v. Republic Steel Corp.*, 362 U.S. 482, 486, 80 S.Ct. 884, 4 L.Ed.2d 903 (1960); *United States v. Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 708, 19 S.Ct, 770, 43 L.Ed. 1136 (1899). *See Wisconsin v. Illinois, supra,* 278 U.S. 367, 49 S.Ct. 163; *Sanitary District of Chicago v. United States,* 266 U.S. 405, 45 S.Ct. 176, 69 L.Ed. 352 (1925). In *Republic Steel* the obstruction to navigable capacity was caused by defendant's dumping of industrial solids into a river. In *Wisconsin v. Illinois* and in *Sanitary District of Chicago,* the obstruction consisted of a lowering of the water level of Lake Michigan as the result of the diversion of lake water through the Chicago River Drainage Canal. Finally, in *Rio Grande* the obstruction was caused by a dam in a portion of a nonnavigable waterway which fed into the navigable waters in question. Defendants' contention that Section 10 is inapplicable to the instant case because both the Delta and Tracy Plants are approximately two miles from navigable waters is untenable if these structures in fact create obstructions to navigable capacity. The test of whether a Section 10 permit is required for a particular project is not wholly dependent upon the location of specific structures but looks also to the operational effect of the project. It is not only the physical structure of the Delta Plant, the Tracy Plant, or the Peripheral Canal which is significant but also the operation of these structures.[21] If

21. As far as the Peripheral Canal is concerned, it is not clear whether the necessity to obtain authorization under Section 9 preempts the need for Section 10 approval. See pp. 626-627, *supra.* It is the opinion of the Court that no such preemption automatically occurs. The two sections deal with different although possibly related

the functional effect of these structures is to obstruct navigable capacity in the Delta, then Section 10 approval will be required.

[20, 21] Second, defendants contend that in order to establish a violation of Section 10, plaintiffs have to prove that the actions in question actually affect navigation. Yet the plain wording of the statute is directly at odds with such a construction. Moreover, Section 9 demonstrates that Congress must have been aware of the difference between obstructions to navigation and obstructions to navigable capacity. Although research has not revealed any case which is dispositive of this question,[22] the Court concludes

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problems and therefore satisfactory resolution of one would not necessarily imply adequate resolution of the other. More specifically, the consequences of the damming of Middle River may be different and are more or less independent from those which arise due to the diversion of water from the Sacramento River. Clearly, however, defendants are not precluded from seeking and obtaining Section 9 and 10 authorization from the Secretary of the Army in one proceeding or one permit application.

22. The principal Section 10 cases are not dispositive of this question. Because the findings of fact of the lower court are not reported in *Sanitary District of Chicago*, it is not clear whether the plaintiff in that case introduced any evidence of effects on navigation caused by the diversion of water from Lake Michigan. There were apparently no witnesses at trial who testified that they actually observed the lowering of the Lake Michigan water level. 266 U.S. at 412, 45 S.Ct. 176. Plaintiff apparently relied on the analyses of expert witnesses. *Ibid.* The court also found that in 1913 the Secretary of War reviewed the Chicago Drainage Canal diversions, including "the obvious fact that so large a withdrawal would lower the levels of the Lakes and the overwhelming evidence that it would affect navigation". However, there is no indication that any of this evidence was adduced at trial. *Ibid.* at 430, 45 S.Ct. at 180. There is language in the opinion which strongly indicates that plaintiffs here need not prove a present effect on navigation. The court stated:

> "Evidence is sufficient, if evidence is necessary, to show that a withdrawal of water on the scale directed by the statute of Illinois threatens and will affect the level of the Lakes, and that is a matter which cannot be done without the consent of

that once there is a finding that the obstruction in question has a substantial effect on navigable capacity, it is not necessary to prove that on specific occasions the obstruction precluded or limited navigation on the waterway in question by specific vessels. Obstructions to navigation differ from obstructions to navigable capacity. The former denotes the actual, present obstruction of navigation while the latter denotes the potential or capacity to obstruct navigation currently or in the future. Proof of the former requires a showing that navigation by specific vessels is presently obstructed while proof of the latter only requires a showing that a condition exists which would obstruct navigation over the waterway if it existed. In the latter case all that is required is proof of the condition which creates the obstruction which has a substantial effect on

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the United States, even were there no international covenant in the case." *Ibid.* at 426, 45 S.Ct. at 179.

Additionally, it is relevant to contrast the extent of the diversions in that case with those in the instant case. In *Sanitary District of Chicago,* the United States sought to enjoin any diversion of water from Lake Michigan in excess of 4,166 cfs (250,000 cubic feet per minute) while in the instant case the present combined water diversion of the Delta and Tracy Plants is 10,900 cfs. Also, Lake Michigan which has a surface area in excess of 20,000 square miles is a substantially larger body of water than those navigable waters in the Delta out of which the Tracy and Delta Plants will divert water. While the court in *Wisconsin v. Illinois, supra,* 278 U.S. at 407-409, 49 S.Ct. 163, expressly found that the Chicago Drainage Canal had an adverse effect on navigation resulting in the loss of 3,346,000 ton miles of water haul on the Great Lakes, it also found that the operation of that canal lowered the water level in four of the Great Lakes by between approximately five and six inches. Finally, in *United States v. Republic Steel Corp., supra,* 362 U.S. at 489, 80 S.Ct. 884, the court reasoned that if the lowering of the water level could constitute an obstruction to navigable capacity, as in *Sanitary District of Chicago,* then the deposit of industrial solids in a navigable river resulting in a decrease in the water depth in that river also constituted an obstruction to navigable capacity. However, the court in *Republic Steel Corp.* did note the shallower water would affect navigation.

navigable capacity. Once plaintiffs prove this fact, it is immaterial that they do not prove that navigation by specific vessels on the waterway in question is presently obstructed.

[22, 23] Under Section 10 therefore, the question before the Court with respect to each of the three structures involved in this case is whether the structure itself or its operational effect is an obstruction to the navigable capacity of any navigable water. The Supreme Court has defined "obstruction to the navigable capacity" to mean to interfere with or diminish the navigable capacity of the waterway in question.[23] *United States v. Rio Grande Dam & Irrigation Co., supra,* 174 U.S. at 709, 19 S.Ct. 770. Furthermore, whether construction and operation of a particular facility creates an obstruction to navigable capacity is a question of fact. *United States v. Rio Grande Dam & Irrigation Co., supra,* 174 U.S. at 709, 19 S.Ct. 770.[24]

Turning first to the Tracy Plant, the evidence adduced at trial establishes that the operation of the facility has two major effects on water in the Delta: (1) It tends to lower the water levels in the Delta, and (2) It causes net flow reversals.[25] Between 1945 and 1949 the Bureau of

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23. Navigable capacity means the capacity for navigation over any part of the waters in question when in their normal condition. *Hubbard v. Fort,* 188 F. 987, 996 (C.C.D. N.J.1911).

24. In that case the court stated that not every appropriation of the upper waters of a navigable stream would constitute an obstruction to navigable capacity, but rather that the test was whether any such appropriation substantially interfered with navigable capacity within the limits where navigation was a recognized fact.

25. Because the Delta is directly affected by the Golden Gate tidal cycle, water in the Delta channels and rivers tends to flow both up channel and down channel during the tidal cycle. However, for any given tidal cycle there is a greater volume of flow in one direction and the amount of this excess is the net flow. A net flow reversal occurs when the net flow for a given tidal cycle is in a different direction than the normal direction.

Reclamation conducted a study of the effect on Delta water levels of export pumping by the Tracy Plant. The study concluded that with a low flow[26] in the San Joaquin River and with the Tracy Plant pumping at the rate of 4600 cfs, the Delta water level in the vicinity of Clifton Court Ferry would be lowered approximately four inches, while there would be no measurable change in the Delta water level near the Stockton ship channel. This study utilized a hydraulic and mathematical model and was not based on actual data since the Tracy Plant was not in operation at that time. In 1968 further studies of the effect of the Tracy Plant pumping on Delta water levels were conducted by varying the pumping rates and measuring the actual effect on water levels at various points in the Delta. One study concluded that Delta water levels near the junction between the inlet channel and Old River would be lowered by 1/10 of a foot per 1,000 cfs pumped, and that Delta water levels would be lowered by decreasing amounts per 1,000 cfs in proportion to the distance from the Tracy Plant. Export pumping effects were measurable as far away as the San Joaquin and Sacramento Rivers. Furthermore, a preliminary draft, subject to review, of the State's Environmental Impact Report (Plaintiffs' Exhibit 17), predicted that at a future export rate of 15,000 cfs, water levels near the San Joaquin River[27] could be lowered as much as 1½ feet at low tide.[28]

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26. Low flow was defined in the study as the worst condition that could occur.

27. However, at trial, Gerald Cox, a civil engineer with the Department of Water Resources testified that the preliminary draft was inaccurate in that the point referred to was actually at Clifton Court Ferry which he felt was some distance from the San Joaquin River.

28. The data from part of the 1968 studies reflects the effect on Delta water levels from the combined export pumping of both the Tracy and Delta Plants. However, part of the study isolated the effects attributable to the Tracy Plant and reached almost the exact same results as the 1945-1949 study.

The evidence also established that the operation of the Tracy Plant has caused a greater flow of San Joaquin River water into Old River toward the Tracy Plant than occurred under pre-Tracy Plant conditions, and during summer periods of low flow in the San Joaquin, there can be a net reversal in the flow of the San Joaquin River between San Andreas Landing and Old River. Additionally, operation of the Tracy Plant in conjunction with the Delta Cross Channel also draws water from the Sacramento River on the edge of the Delta to the interior Delta and to the export pumps.

Similarly, the operation of the Delta Plant tends to lower water levels in the Delta region and to cause net flow reversals. Prior to the construction of Clifton Court Forebay, the Delta Plant operations resulted in lowered water levels in Italian Slough and caused bank erosion problems due to the increased speed of flow. A test conducted by the State in August and September of 1968 indicated that an increase in pumping by 6100 cfs by both the Delta and Tracy Plants resulted in a lowering of the water level in Italian Slough by 6/10 of a foot. Subsequent tests indicated that diversions of water into Clifton Court Forebay would have an even greater effect on water levels in the Delta. Combined diversions by the Forebay intake facility and the Tracy Plant between 9600 and 12,000 cfs during both high high and low high tides resulted in a lowering of the water level at Clifton Court Ferry by 1 to 1½ feet and a lowering at Rindge Pump (located on the San Joaquin River) of just under 1/10 of a foot.[29] While there

29. Throughout this most recent test in May of 1974, the Tracy Plant operated at close to its maximum pumping capacity. Hence, the test results would seem to reflect only those changes in the water level due to the Delta Plant diversions.

may be some question as to the accuracy of these figures, they are found to be the minimum effect on Delta water levels of water diversions by the Forebay and the Tracy Plant[30] since they were offered by the state defendants. It is quite conceivable that the effects could be greater and it is highly probable if not certain that an expanded pumping capacity would result in even greater effects.

The operation of the Delta Plant has caused net flow reversals in the San Joaquin River during some summer months, and during most of the year in the Old and Middle Rivers. The state defendants marked for identification a chart which apparently illustrated some specific effects on flow reversals as a result of export pumping by the Delta and Tracy Plants. This exhibit was not introduced into evidence, and hence there is no detailed evidence of the magnitude of net flow reversals caused by export pumping. There was, however, testimony from which it can be inferred that operation of the Clifton Court Forebay intake facility has the potential to affect water velocities significantly in nearby channels.[31] Finally, a preliminary draft subject to revision, of the State's Environmental Impact Report on the Peripheral Canal contained statements from which the Court could infer that Delta export pumping

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30. During the trial Dr. James A. Harder, an expert witness for the state defendants, stated unequivocally that if the Clifton Court Forebay radial gates were operated wide at low low tides, and the water level of the Forebay was lower than that at Clifton Court Ferry, then the water level outside the Forebay would be lowered.

31. There was testimony that the operation of the Clifton Court Forebay radial gates was limited by the state defendants so that the water velocity in the nearby channels would not exceed 3 feet per second. The reason for this operational limitation was to prevent bedload movement in the adjacent channels. Bedload movement is the movement of the bottom sands of the channel due to high water velocity.

through the Tracy and Delta Plants caused the Old and Middle Rivers to flow upstream occasionally at Bacon Island and caused the San Joaquin River to flow upstream occasionally below the head of Old River.

With respect to the proposed operation of the Peripheral Canal, the evidence established that there would be significant effects on the velocity and water level of the Sacramento River. If constructed, the Peripheral Canal will divert waters from the Sacramento River near Hood, California. The rate of flow of water in the Sacramento River at that location varies between 10,000 cfs and 100,000 cfs. Donn J. Stafford, a civil engineer with the Department of Water Resources, testified that at various times during the year the Canal would divert significantly more than 50% of the Sacramento River flow and at times could divert as much as 80% of that flow. It also appeared that diversion would decrease the velocity and lower the water level of the Sacramento River downstream from the Peripheral Canal intake. Finally, the Canal would result in the closure or modification of a number of rivers and sloughs in the Delta including the complete damming of the Middle River. With respect to the Middle River closure, no provision has been made for the passage of boats past this point on the River.

[24] In sum, with respect to the Delta and Tracy Plants the evidence adduced at trial was clear and convincing that export pumping by these facilities both lowered Delta water levels and at certain times caused net flow reversals in Delta waterways. Although it is true that the exact magnitude of these effects was not precisely established, it is clear that they are far from any sort of *de minimis* exception established by *Rio Grande*. Because there was evidence that the water level would be lowered at least one to 1½ feet

in the vicinity of Clifton Court Ferry, the Court will not decide whether the smaller effects (i. e., several inches) at locations considerably more distant from the pumping plants, standing alone, would constitute a sufficient obstruction to navigable capacity so as to require Section 10 approval.

[25] With respect to the Peripheral Canal, the evidence regarding the anticipated effects on navigable capacity was even less precise with respect to magnitude but equally convincing that the effect would be substantial. It was clear that at various times throughout the year the Peripheral Canal would divert substantial amounts of water from the Sacramento River in the vicinity of Hood, California, and that these diversions would both lower the water levels and decrease water velocities downstream from the intake facility.

Accordingly, the Court concludes that the operation of the Tracy and Delta Plants presently obstructs the navigable capacity of various navigable waters in the Delta.[32] The Court further concludes that as presently proposed, the Peripheral Canal will also result in an obstruction to navigable capacity of the Sacramento River. More specifically, the Court finds that, in the case of each of the three facilities, the obstruction is the result of the modification or alteration of the condition or capacity of the channel of navigable water of the United States and hence is governed by the third clause of Section 10.

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32. The operation of the Delta and Tracy Plants results in the obstruction of the navigable capacity of Old River, which is a navigable water of the United States. Since obstruction of the navigable capacity of this river suffices to bring the Tracy and Delta Plants within the scope of Section 10, the Court need not decide to what extent diversions by the Tracy and Delta Plants obstruct the navigable capacities of sloughs, canals, and other rivers in the Delta.

b. *Authorization under Section 10*

[26] Since Section 10 requires that authorization be obtained for the construction and operation of the Tracy and Delta Plants and the proposed construction and operation of the Peripheral Canal, the Court now turns to the question whether any of these facilities has been properly authorized. Although the statute itself is somewhat unclear as to what constitutes proper authorization, in a case such as the instant one governed by the third clause, the United States Supreme Court definitely resolved this ambiguity in the landmark case of *Wisconsin v. Illinois, supra,* 278 U.S. 367, 49 S.Ct. 163. The Court held in that case that congressional authorization was not necessary for obstructions within the purview of the second and third clauses of Section 10 and that those obstructions need only be recommended by the Chief of Engineers and authorized by the Secretary of the Army.[33] 278 U.S. at 412-413, 49 S.Ct. 163. While congressional consent is an alternative, it is not necessary for obstructions falling within the second and third clauses of Section 10 if the approval of the Secretary of the Army is obtained.

Accordingly, the Court addresses the question whether any of the three facilities has been authorized by Congress or by the Secretary of the Army upon recommendation by the Chief of Engineers. With respect to the Peripheral

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33. The main problem is interpreting the interrelationship of the three clauses in Section 10. These could be read as three independent prohibitions prescribing three different and mutually exclusive types of obstructions. However, in one early case, a lower court held that congressional consent was mandatory as to each type of obstruction and that clauses two and three were merely delegations to the Secretary of the Army of a supervisory power over the character and performance of the proposed construction where the work in question was of the specific type described in those clauses. *Hubbard v. Fort, supra,* 188 F. at 997. That position was expressly overruled in *Wisconsin v. Illinois, supra,* 278 U.S. at 412-413, 49 S.Ct. 163.

Canal, defendants make no contention that such authorization has been obtained.[34] With respect to the authorization of the Delta and Tracy Plants, defendants have made three basic contentions regarding authorization: (1) that various Section 10 permits which have been issued over the years authorize the facilities, (2) that approval of the navigation aspects of the subject matter of FPC license application No. 2426 by the Secretary of the Army and the Chief of Engineers eliminates the need for Section 10 approval, and (3) that any number of congressional acts (mostly appropriation acts) constitute congressional consent pursuant to clause one of Section 10. For the reasons set forth below, the Court disagrees with all three contentions and, accordingly, finds the construction and operation of the Tracy and Delta Plants without the required authorization to be unlawful.

i. *Section 10 Permits*

[27, 28] The federal defendants contend that the Secretary of War approved the Tracy Plant in a letter to the Secretary of Interior dated February 15, 1946. At the trial that letter was never offered as an exhibit and although the federal defendants never abandoned this contention, they did not provide the Court with a copy. The Court, taking judicial notice of the letter which is contained in S.Doc. No. 113, 81st Cong., 1st Sess. 275 (1949), obtained a copy of the letter from the Public Library. An examination of this letter revealed that its subject matter basically concerned a jurisdictional dispute between the Department of Interior and the Department of War over the construction and operation of reservoir projects in the Sacramento-

34. With respect to the Peripheral Canal, it is conceded that its construction will require authorization under Sections 9 and 10 of the Rivers and Harbors Act of 1899. For the reasons set forth herein, a permit under Section 10 will likewise be required for its operation.

San Joaquin Basin. Nowhere in the letter was the Tracy Plant specifically mentioned. The only tenuous connection between the Tracy Plant and the letter is that the Tracy Plant was part of the broad plan for the Central Valley Basin referred to in the letter. The letter on its face characterizes itself as the views and recommendations of the War Department on the Bureau of Reclamation's report on the Central Valley Basin pursuant to Section 1 of the Flood Control Act approved December 22, 1944. Additionally, this letter does not rise to the level of formality of the other Section 10 permits introduced into evidence. Not only does this letter not constitute a Section 10 permit, it is clear that it does not even constitute approval of the Tracy Plant.

[29] The federal defendants next contend that in any event in 1955 the Bureau of Reclamation applied for and received a permit to construct fish collecting facilities and headworks at the junction of the Old River and the Tracy Plant intake channel, and that this permit constitutes Section 10 authorization. However, the narrow scope of that permit simply does not support such a contention. It provided specifically that "[t]he structures and work shown on the drawings hereto attached and presented in your letter dated 25 August 1955, for construction of headworks and fish collecting facilities at the junction of Old River and the Delta-Mendota Canal, Contra Costa County, California, have been recommended by the Chief of Engineers and are authorized by the Secretary of the Army." See Plaintiffs' Exhibit 22. In this permit no mention is made of the other structures (*i. e.*, the pumping plant) or of the operation of those facilities. The limited scope of the permit is also reflected in the Bureau of Reclamation's application. That application describes the proposed construction of the headworks and fish collecting facilities. It specifically states that

"[r]equest is hereby made for a permit for the Bureau of Reclamation to construct the headworks and fish collecting facilities in accordance with the above data and drawings." See Plaintiffs' Exhibit 22. Additionally, in the application, the Bureau of Reclamation states that it is not sure whether "a permit from you will be necessary *to perform this particular work*" (emphasis supplied), but is submitting one anyway so that the Corps can make the determination. See Plaintiffs' Exhibit 22.

The state defendants contend that various Section 10 permits issued with respect to certain components of the Delta Plant constitute authorization under Section 10 of the construction and operation of the entire Delta Plant and not merely the specific components. The Department of Water Resources at no time applied for a permit from the Chief of Engineers or the Secretary of the Army pursuant to Sections 9 and 10 of the Rivers and Harbors Act of 1899 with respect to the construction of the Delta Plant or its original intake channel. It did, however, apply for several Section 10 permits in conjunction with the construction of Clifton Court Forebay. On June 28, 1966, the Department of Water Resources applied for a Section 10 permit authorizing it to build a permanent dike across Italian Slough approximately one mile southwest of Old River. Although the Corps issued such a permit (#4014) on February 10, 1967, the Department of Water Resources abandoned its plan and instead built a closure dike at the junction between the original intake channel and Italian Slough.[35] On February 24, 1967, the Corps issued a permit (#4006) author-

35. It should be noted that the Department of Water Resources never received a permit to construct this dike. However, in its application for a permit to construct the Clifton Court Forebay inlet control structure, see *infra*, the Department did state that "[w]hen the forebay becomes operational, we will close our present inlet structure by replacing a section of the Italian Slough levee." See Plaintiffs' Exhibit 25.

izing the construction and maintenance of a water quality monitoring recorder station in Old River at Clifton Court Forebay. On May 3, 1967, the Department of Water Resources applied for a Section 10 permit to cut the westerly levee of West Canal and Old River in order to build an inlet control structure for Clifton Court Forebay. Subsequently, permit #4101 was issued on June 15, 1967, authorizing the cutting of the westerly levee of West Canal. Finally, on June 17, 1969, the Corps of Engineers issued permit #4410 authorizing the Department of Water Resources to install velocity meters and bury armored cables five feet deep in West Canal. That permit contained a condition requiring the Department of Water Resources to comply promptly with regulations of the Federal Water Pollution Control Administration and/or the state water pollution control agency having jurisdiction.

[30, 31] The Court finds that these permits do not constitute Section 10 authorization. These permits authorized only the specific construction work described in the applications and not the construction of the entire pumping plant facilities. It is insufficient to assert that because the Corps of Engineers was a member of the Interagency Delta Committee and a participant in other studies of Delta water problems, it must have had constructive knowledge of the entire facility, and consequently that approval of the components must be deemed approval of the whole facility. There is no direct evidence from the particular permit files that the Corps was approving the entire facility when it approved the various components.[36] Even assuming strong circumstantial evidence of constructive knowledge, this evidence would not constitute approval of the construction of the facilities. The fact that the Corps had knowledge of the

36. See Plaintiffs' Exhibits 22, 22A, 23, 24, 24A, 25, 25A; State Defendants' Exhibit 11.

Delta Plant does not imply that it approved the Delta Plant. Additionally, it is clear that all of these permits were obtained after construction had commenced. Even if the Court believed that these permits authorized the *construction* of the Delta Plant, it is clear that they do not authorize the *operation* of that facility. Because of the clear adverse effects on navigable capacity and the possible adverse environmetal effect of export pumping under certain factual situations, it is inconceivable that the Corps of Engineers would have granted any permits without incorporating certain conditions of operation therein, and without appending in its files a sufficient factual record to show the type of consideration required by the Rivers and Harbors Act of 1899 and the various environmental statutes then in effect.[37] The Department of Water Resources recognizes certain adverse effects of the Delta Plant diversions, and it has an operational policy of never opening the Forebay radial gates during the three-hour period before and after low low tide. Additionally, it operates those radial gates so as never to allow the water velocity in the nearby channels to exceed three feet per second. In the absence of a clear showing that the Corps was in fact approving the operations of these facilities, the Court is compelled to find no authorization through the Section 10 permit procedure. It seems most likely that the Corps misconstrued the scope of Section 10's coverage.[38]

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37. For instance, the permits might have limited export pumping to certain levels during the dry parts of the year and during certain parts of the tidal cycle.

38. In considering an application for a Section 10 permit, the Secretary of the Army and the Chief of Engineers must weigh the conservation effects of the subject matter of the application. *Zabel v. Tabb*, 430 F.2d 199, 213 (5th Cir. 1970), *cert. denied*, 401 U.S. 910, 91 S.Ct. 873, 27 L.Ed.2d 808 (1971). Moreover, the Secretary of the Army can refuse to issue a Section 10 permit on conservation grounds. 430 F.2d at 214.

ii. *The FPC License*

The state defendants next contend that approval by the Corps of Engineers of the navigational aspects of the subject matter underlying FPC license application No. 2426 constituted Section 10 approval or eliminated the need to obtain Section 10 approval. In December of 1965 the state applied for a Federal Power Commission license for the California Aqueduct and certain other structures, some of which were power related. Among the structures included in the application were the Delta Plant and its appurtenant structures and the Clifton Court Forebay. FPC procedures required the administrative law judge to submit the application to the Corps of Engineers for approval of all navigational aspects of the Project. See 16 U.S.C. § 797(e). Although the Corps sent approval in the form of a letter dated May 18, 1966, there is no evidence that the Corps gave consideration either to environmental factors or to the effect on navigation of water diversions (*i. e.*, by causing changes in water levels and net flow reversals). Although the administrative law judge eventually authorized the license, the FPC reviewed his decision and confined the jurisdiction of the license to those portions of the project involving power facilities, all of which are in Southern California. *Department of Water Resources,* FPC Opinion No. 688 (February 6, 1974).[39]

[32] The Court finds the state defendants' contentions with respect to FPC license application No. 2426 unfounded. It is not entirely clear to what extent FPC jurisdiction and regulation preempts regulations by Sections 9 and 10 of

39. The Court notes that the FPC also remanded the license proceeding to the administrative law judge in order to comply with the NEPA procedures outlined in *Greene County Planning Board v. Federal Power Commission,* 455 F.2d 412 (2d Cir. 1972).

the Rivers and Harbors Act of 1899. One court has held that no Section 10 permit is required for the construction of a hydroelectric plant licensed by the FPC. *Scenic Hudson Preservation Conference v. Callaway,* 370 F.Supp. 162, 167 (S.D.N.Y. 1973) *aff'd.,* 499 F.2d 127 (2d Cir. 1974). The Court does not believe that the decision was intended to allow back-door approval of any structure however remotely related to the basic power project. In *Scenic Hudson* the court limited its holding to the hydroelectric plant. In the instant case the FPC restricted its jurisdiction to those portions of the project involving power facilities and hence *Scenic Hudson* is unhelpful to the state defendants. The rationale underlying *Scenic Hudson* is that there should be one centralized procedure to obtain federal approval of power projects. Its purpose was not to grant an applicant blanket approval for any and all facilities which he described in his license application. Additionally, it is no assistance to state defendants that the Corps sent its letter of approval prior to the FPC's jurisdictional decision. It is quite possible that the Corps felt it was granting approval only to those structures over which the FPC eventually asserted jurisdiction. Also, because the Corps' letter was dated May 18, 1966, and because the state's FPC license application was not amended to include the Clifton Court Forebay until July 10, 1967, it is clear that the May 18th letter did not take into account the Clifton Court Forebay.[40] Nowithstanding *Scenic Hudson,* because the Delta Plant will not be within the jurisdiction of any subsequently issued FPC license No. 2426, the Court must independently assess

40. In the Agreed Pre-Trial Order the state defendants contended that there was a second letter from the Corps to the FPC dated January 25, 1968. See Agreed Pre-Trial Order, § 4.5.2. Although that letter was introduced into evidence, it did not in any way indicate approval of the navigational aspects of the project.

the May 18th letter and determine whether that constituted Section 10 authorization of the operation of the Delta Plant. The Court concludes that the Corps never seriously took under consideration the effect of water diversions by the Delta Plant when it sent its letter of approval. The letter itself states that "[t]he plans of the structures affecting navigation are satisfactory". This language tends to indicate that if the Corps gave consideration to anything, it was the structures themselves and not the operation of those structures. In the absence of a clear showing that the Corps intended their letter to serve as a Section 10 approval for the Delta Plant, the Court refuses to so construe it.

iii. *Congressional Authorization*

[33] The Court also concludes that Congress did not affirmatively authorize any of the facilities in question. Defendants concede that they have obtained no congressional approval of the Peripheral Canal. The federal defendants contend, however, that certain acts of Congress (including, *inter alia,* appropriation acts) constituted consent to the Tracy Plant. Without specifically discussing each individual act, the Court makes the following observations. The initial authorization to create an obstruction must rest on express and not implied congressional authority. *Cf. Hubbard v. Fort, supra,* 188 F. at 996. The approval or funding of a facility does not compromise Congress's right to control its operation. *Sanitary District of Chicago v. United States, supra,* 266 U.S. at 428, 45 S.Ct 176.

[34, 35] In the instant case none of the acts in question either contain sufficiently explicit language or are accompanied by a legislative history clearly manifesting approval of the facilities for the purpose of Section 10. For the most part these acts do not even refer specifically to the pumping plant but rather are very general approvals of the Cen-

tral Valley Project or the San Luis Unit.[41] All Congress did was authorize the construction of those projects and appropriate funds for them. Congress did not, however, agree to relinquish its Section 10 responsibilities or exercise this power in any respect.[42] Even if Congress had gone so

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41. In the Act authorizing the construction of the San Luis Unit of the Central Valley Project, Congress imposed certain restrictions on the operation of that unit. Public Law 86-488, 74 Stat. 156. Specifically Section 4 of that Act purportedly limited the daily diversion from the Delta via the Tracy Plant under certain conditions. Even if this section were effective, it does not constitute congressional consent. The Act authorized the San Luis Unit (consisting of, *inter alia,* the San Luis Dam, the San Luis Reservoir, the San Luis Forebay (O'Neil Forebay), and the San Luis Canal (California Aqueduct)) and not the Tracy Plant which was already in operation. The fact that Congress places certain limitations on the operation of an already existing facility does not, standing alone, constitute Section 10 authorization, for the already existing facility. Section 4 would be just as consistent with an intent to require the diversion of high quality water as it would with an intent to solve navigational and environmental problems in the Delta. Moreover, that section may not be effective, since it appears to be conditioned upon the operation of the San Luis works *solely* as a federal project. The San Luis works are joint use facilities of the state and federal governments. See Agreed Pre-Trial Order, § 3.22. Further, this Act was enacted several years after the commencement of the operation of the Tracy Plant, and hence even if it were intended as Congressional consent, the original construction and operation of the Tracy Plant were unlawful.

42. In *Sanitary District* the Secretary of War had turned down the defendants' Section 10 permit application. Defendants had argued that a prior congressional act granting land to the State of Illinois for a canal to unite the waters of the Illinois River with those of Lake Michigan constituted authorization. The Court rejected their contention stating that:

> "The act granted land to Illinois in aid of a canal to be opened by the State for the purpose of uniting the waters of the Illinois River with those of Lake Michigan, but if it has any bearing on the present case it certainly vested no irrevocable discretion in the State with regard to the amount of water to be withdrawn from the Lake. It said nothing on that subject. We repeat that we assume that the United States desires to see the canal maintained and therefore pass by as immaterial all evidence of its having fostered the work. Even if it had approved the very size and shape of the channel by act of

far as specifically to find the construction of the Tracy Plant precisely as it stands today, this fact would not constitute authorization to operate it, as before operation occurred, either Congress or the Corps of Engineers would have to consider within what Section 10 parameters the Tracy Plant could operate and issue an appropriate authorization.

Accordingly, the Court concludes that the operation of the Tracy and Delta Plants obstructs the navigable capacity of various waters in the Delta, and because these obstructions are the result of the modification or alteration of the condition or capacity of the channel of navigable water, they are governed by the third clause of Section 10. Additionally, because the Court concludes that appropriate authorization has not been obtained, the operation of the Tracy and Delta Plants is and will be unlawful until the proper authorization is obtained. The Court also concludes that, as presently proposed, the operation of the Peripheral Canal will obstruct the navigable capacity of navigable water of the United States, and this obstruction will be governed by the third clause of Section 10. Because the parties concede that no authorization has been obtained

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Congress it would not have compromised its right to control the amount of water to be drawn from Lake Michigan. It seems that a less amount than now passes through the canal would suffice for the connection which the United States has wished to establish and maintain." 266 U.S. at 427-428, 45 S.Ct. at 179. State defendants' reliance upon *Friends of the Earth v. Armstrong*, 485 F.2d 1 (10th Cir. 1973) (*en banc*), *cert. denied*, 414 U.S. 1171, 94 S.Ct. 933, 39 L.Ed.2d 120 (1974), is misplaced. There, congressional intent was quite explicit both on the face of the acts in question and in the accompanying legislative history. Similarly, in *United States v. Dickerson*, 310 U.S. 554, 555, 60 S.Ct. 1034, 84 L.Ed. 1356 (1940), the Court held that Congress could suspend certain provisions of a prior act (military re-enlistment allowances) through an amendment to an appropriation bill. However, in that case congressional intent was manifestly clear from both the language of the Act and the legislative history.

for the Canal, operation of the Canal in the absence of proper authorization would be unlawful.

III. FISH AND WILDLIFE COORDINATION ACT

In their third claim for relief, plaintiffs allege that the construction and operation of the Delta and Tracy Plants, and the proposed construction and operation of the Peripheral Canal, are in violation of Sections 2 and 3 of the Fish and Wildlife Coordination Act (FWCA), 16 U.S.C. §§ 662 and 663.

Section 1 of FWCA is a general policy statement setting forth a declaration of the congressional purpose underlying the Act, namely, that wildlife conservation receive equal consideration with other features of water-resource development.[43] Whenever the waters of any body of water are

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43. Section 1 provides:

"For the purpose of recognizing the vital contribution of our wildlife resources to the Nation, the increasing public interest and significance thereof due to expansion of our national economy and other factors, and to provide that wildlife conservation shall receive equal consideration and be coordinated with other features of water-resource development programs through the effectual and harmonious planning, development, maintenance and coordination of wildlife conservation and rehabilitation for the purposes of sections 661 to 666c of this title in the United States, its Territories and possessions, the Secretary of the Interior is authorized (1) to provide assistance to, and cooperate with, Federal, State, and public or private agencies and organizations in the development, protection, rearing, and stocking of all species of wildlife, resources thereof, and their habitat, in controlling losses of the same from disease or other causes, in minimizing damages from overabundant species, in providing public shooting and fishing areas, including easements across public lands for access thereto, and in carrying out other measures necessary to effectuate the purposes of said sections; (2) to make surveys and investigations of the wildlife of the public domain, including lands and waters or interests therein acquired or controlled by any agency of the United States; and (3) to accept donations of land and contributions of funds in furtherance of the purposes of said sections." 16 U.S.C. § 661.

proposed or authorized to be impounded or diverted by any federal agency or by any public or private agency acting under Federal permit or license, Section 2(a) of FWCA requires that agency first to consult with the United States Fish and Wildlife Service and with the state agency having jurisdiction over fish and wildlife with a view to the conservation of wildlife resources.[44] Section 2(b) requires, *inter alia*, that Section 2(a) reports be made an integral part of any report prepared or submitted by a federal agency responsible for engineering surveys to Congress or to any agency having the authority to authorize the construction of the water resource development project.[45] Finally, Section 3(a) states that where a federal agency diverts or impounds water, adequate provision con-

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44. Section 2(a) provides:
"Except as hereafter stated in subsection (h) of this section, whenever the waters of any stream or other body of water are proposed or authorized to be impounded, diverted, the channel deepened, or the stream or other body of water otherwise controlled or modified for any purpose whatever, including navigation and drainage, by any department or agency of the United States, or by any public or private agency under Federal permit or license, such department or agency first shall consult with the United States Fish and Wildlife Service, Department of the Interior, and with the head of the agency exercising administration over the wildlife resources of the particular State wherein the impoundment, diversion, or other control facility is to be constructed, with a view to the conservation of wildlife resources by preventing loss of and damage to such resources as well as providing for the development and improvement thereof in connection with such water-resource development." 16 U.S.C. § 662(a).

45. Section 2(b) provides:
"In furtherance of such purposes, the reports and recommendations of the Secretary of the Interior on the wildlife aspects of such projects, and any report of the head of the State agency exercising administration over the wildlife resources of the State, based on surveys and investigations conducted by the United States Fish and Wildlife Service and such State agency for the purpose of determining the possible damage to wildlife resources and for the purpose of determining means and measures that should be adopted to prevent

sistent with the primary purposes of the diversion shall be made for the conservation, maintenance and management of wildlife resources, including the development and improvement of wildlife resources, pursuant to the provisions of Section 2.[46] Although FWCA was amended in 1958, the

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the loss of or damage to such wildlife resources, as well as to provide concurrently for the development and improvement of such resources, shall be made an integral part of any report prepared or submitted by any agency of the Federal Government responsible for engineering surveys and construction of such projects when such reports are presented to the Congress or to any agency or person having the authority or the power, by administrative action or otherwise, (1) to authorize the construction of water-resource development projects or (2) to approve a report on the modification or supplementation of plans for previously authorized projects, to which sections 661 to 666c of this title apply. Recommendations of the Secretary of the Interior shall be as specific as is practicable with respect to features recommended for wildlife conservation and development, lands to be utilized or acquired for such purposes, the results expected, and shall describe the damage to wildlife attributable to the project and the measures proposed for mitigating or compensating for these damages. The reporting officers in project reports of the Federal agencies shall give full consideration to the report and recommendations of the Secretary of the Interior and to any report of the State agency on the wildlife aspects of such projects, and the project plan shall include such justifiable means and measures for wildlife purposes as the reporting agency finds should be adopted to obtain maximum overall project benefits." 16 U.S.C. § 662(b).

46. Section 3(a) provides:

"Subject to the exception prescribed in section 662(h) of this title, whenever the waters of any stream or other body of water are impounded, diverted, the channel deepened, or the stream or other body of water otherwise controlled or modified for any purpose whatever, including navigation and drainage, by any department or agency of the United States, adequate provision, consistent with the primary purposes of such impoundment, diversion, or other control, shall be made for the use thereof, together with any areas of land, water, or interest therein, acquired or administered by a Federal agency in connection therewith, for the conservation, maintenance, and management of wildlife resources thereof, and its habitat thereon, including the development and improvement of such wildlife resources pursuant to the provisions of section 662 of this title." 16 U.S.C. § 663(a).

predecessor provisions had substantially the same language and created equally extensive duties.

[36, 37] The Court first addresses the question whether any private right of action arises under FWCA. The only authority on this question of which the Court is aware has answered in the negative. *Environmental Defense Fund, Inc. v. Corps of Engineers,* 325 F.Supp. 749, 754 (E.D.Ark. 1971). See *Environmental Defense Fund, Inc. v. Corps of Engineers,* 325 F.Supp. 728, 739 (E.D.Ark 1971). Further, plaintiffs simply have not established that inference of such a private right of action would be consistent with the legislative intent of FWCA and with the effectuation of the purposes intended to be served by the Act, as required by *Cort v. Ash, supra,* 95 S.Ct. 2080; *Securities Investor Protection Corp. v. Barbour, supra,* 95 S.Ct. 1733; and *Amtrak, supra,* 414 U.S. at 457-458, 94 S.Ct. 690. It seems likely that congressional enactment of the National Environmental Policy Act acts as an implicit proscription of such a private right of action.[47] Additionally, H.R. 14527 introduced in the House of Representatives in 1974 would amend FWCA so as explicitly to establish a private right of action. H.R. 14527, 93d Cong., 2d Sess. § 10 (1974). Although not conclusive evidence with respect to the instant issue, H.R. 14527 does indicate that at least certain members of Congress believe that further legislation is necessary to create

47. The courts have held that compliance with the National Environmental Policy Act will automatically satisfy the requirements of FWCA and that there will be no need separately to comply with FWCA. *Environmental Defense Fund, Inc. v. Froehlke,* 473 F.2d 346, 356 (8th Cir. 1972). *See Environmental Defense Fund, Inc. v. Corps of Engineers, supra,* 325 F.Supp. at 754. *Cf. Cape Henry Bird Club v. Laird,* 359 F.Supp. 404, 417 (W.D.Va.1973), aff'd., 484 F.2d 453 (4th Cir. 1973). Any failure to comply with FWCA should be challenged in a suit attacking the adequacy of compliance with NEPA. *See Environmental Defense Fund, Inc. v. Corps of Engineers, supra,* 325 F.Supp. at 754. *Cf. Cape Henry Bird Club v. Laird, supra,* 359 F.Supp. at 418.

a private right of action under FWCA. The Court concludes that no private right of action arises under FWCA and, accordingly, the Court dismisses plaintiffs' third claim with prejudice.

IV. NATIONAL ENVIRONMENTAL POLICY ACT OF 1969

Plaintiffs' fourth claim for relief alleges that the construction of the proposed Peripheral Canal and the proposed increases in the volume of water to be pumped at the Tracy and Delta Plants, together with any modifications thereto necessary to accommodate such increases will violate the National Environmental Policy Act (NEPA), 42 U.S.C. § 4321 *et seq.*, unless adequate Environmental Impact Statements (EIS) are first prepared by the responsible federal agencies.

Section 2 of NEPA sets forth the congressional purposes of NEPA.[48] Section 101 of NEPA contains a congressional declaration of national environmental policy[49] Section 102

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48. Section 2 states:
"The purposes of this chapter are: To declare a national policy which will encourage productive and enjoyable harmony between man and his environment; to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man; to enrich the understanding of the ecological systems and natural resources important to the Nation; and to establish a Council on Environmental Quality." 42 U.S.C. § 4321.

49. Section 101 states:
"(a) The Congress, recognizing the profound impact of man's activity on the interrelations of all components of the natural environment, particularly the profound influences of population growth, high-density urbanization, industrial expansion, resource exploitation, and new and expanding technological advances and recognizing further the critical importance of restoring and maintaining environmental quality to the overall welfare and development of man, declares that it is the continuing policy of the Federal Government, in co-

of NEPA establishes a mandatory procedure to compel consideration and adherence to the newly enacted environmental policy by requiring the completion of an EIS before major federal actions significantly affecting the quality of human environment can be taken.[50] The EIS is significant

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operation with State and local governments, and other concerned public and private organizations, to use all practicable means and measures, including financial and technical assistance, in a manner calculated to foster and promote the general welfare, to create and maintain conditions under which man and nature can exist in productive harmony, and fulfill the social, economic, and other requirements of present and future generations of Americans.

"(b) In order to carry out the policy set forth in this chapter, it is the continuing responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs, and resources to the end that the Nation may—

"(1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;

"(2) assure for all Americans safe, healthful, productive, and esthetically and culturally pleasing surroundings;

"(3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;

"(4) preserve important historic cultural, and natural aspects of our national heritage, and maintain wherever possible, an environment which supports diversity and variety of individual choice;

"(5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and

"(6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

"(c) The Congress recognizes that each person should enjoy a healthful environment and that each person has a responsibility to contribute to the preservation and enhancement of the environment." 42 U.S.C. § 4331.

50. Section 102 states:

"The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in ac-

cordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—

"(A) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decisionmaking which may have an impact on man's environment;

"(B) identify and develop methods and procedures, in consultation with the Council on Environmental Quality established by subchapter 11 of this chapter, which will insure that presently unqualified environmental amenities and values may be given appropriate consideration in decisionmaking along with economic and technical considerations;

"(C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—

"(i) the environmental impact of the proposed action,

"(ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,

"(iii) alternatives to the proposed action,

"(iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and

"(v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes;

"(D) study, develop, and describe appropriate alternatives to recommended courses of action in any proposal which involves unresolved conflicts concerning alternative uses of available resources;

"(E) recognize the worldwide and long-range character of environmental problems and, where consistent with the foreign policy of the United States, lend appropriate support to initiatives, resolutions, and programs designed to maximize international cooperation in anticipating and preventing a decline in the quality of mankind's world environment;

"(F) make available to States, counties, municipalities, institutions, and individuals, advice and information useful in

in two major respects. Firstly, it requires federal agencies to review and assess the environmental effects of major actions they propose to undertake.[51] Secondly, it provides a ready source of information and evidence so that the public, Congress, and the courts can review those major federal actions significantly affecting the environment. Whether NEPA also creates substantive rights and whether courts will perform a substantive, as opposed to merely a procedural, review of an EIS is an unresolved question.[52] However, since there is not a final EIS on any aspect of the Peripheral Canal project before the Court, judgment is reserved on this question until a later day.

The Court must first determine whether the requirements of Section 102 apply to any of the three facilities which

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restoring, maintaining, and enhancing the quality of the environment;

"(G) initiate and utilize ecological information in the planning and development of resource-oriented projects; and

"(H) assist the Council on Environmental Quality established by subchapter II of this chapter." 42 U.S.C. § 4332.

51. See CEQ Guidelines § 1500.1(a).

52. *See Environmental Defense Fund, Inc. v. Corps of Engineers,* 492 F.2d 1123, 1138-1140 (5th Cir. 1974); *Sierra Club v. Froehlke,* 486 F.2d 946, 953 (7th Cir. 1973); *Conservation Council v. Froehlke,* 473 F.2d 664, 665 (4th Cir. 1973); *Environmental Defense Fund, Inc. v. Corps of Engineers,* 470 F.2d 289, 300-301 (8th Cir. 1972), *cert. denied,* 412 U.S. 931, 93 S.Ct. 2749, 37 L.Ed.2d 160 (1973); *National Helium Corp. v. Morton,* 455 F.2d 650, 656 (10th Cir. 1971); *Calvert Cliff's Coordinating Comm. v. AEC,* 146 U.S.App.D.C. 33, 449 F.2d 1109, 1115 (1971); *Environmental Defense Fund v. TVA,* 371 F.Supp. 1004, 1013 (E.D.Tenn.1973), *aff'd.,* 492 F.2d 466 (6th Cir. 1974); *Conservation Society v. Secretary of Transportation,* 362 F.Supp. 627, 632 (D.Vt.1973) (Oakes, J.), *aff'd.,* 508 F.2d 927 (2d Cir. 1974). *Cf. Daly v. Volpe,* 514 F.2d 1106, 1108-1109 (9th Cir. 1975); *Lathan v. Brinegar,* 506 F.2d 677, 692-693 (9th Cir. 1974) (*en banc*). *See also Note, The Least Adverse Alternative Approach to Substantive Review Under NEPA,* 88 Harv.L.Rev. 735 (1975); *Note, Substantive Review Under the National Environmental Policy Act: EDF v. Corps of Engineers,* 3 Ecol.L.Q. 173 (1973).

are the subject matter of this controversy.[53] There is no question that the operational effects of each of the three facilities will have significant effects on the environment. All of the parties to this suit are in agreement on this point.[54] The main issue is whether there is major federal action present, thus requiring an EIS.

A. *The Peripheral Canal*

With respect to the Peripheral Canal, major federal action can be derived from one or both of two bases. The first of these bases is participation by the Bureau of Reclamation in the construction, operation, or even planning of the Canal, and the second is the issuance of Section 9 and 10 permits authorizing the construction and operation of the Canal.

1. *Bureau of Reclamation Participation*

If there is federal participation in the construction or operation of the Peripheral Canal, it is clear that either act will constitute major federal action necessitating compliance with NEPA. It is not clear, however, whether there is presently, or in the future will be, such federal participation. At the trial, evidence was adduced with respect to the extent of federal participation in the Peripheral Canal project.

In the early 1960s the Bureau of Reclamation was active in formulating development plans for the Peripheral Canal and in fact performed the bulk of this development work

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53. The Court notes that NEPA does not define the term "major federal actions significantly affecting the environment". The Council on Environmental Quality has, however, promulgated certain guidelines and regulations defining the term "actions". CEQ Guidelines § 1500.5, and identfying major actions significantly affecting the environment. CEQ Guidelines § 1500.6.

54. In the Agreed Pre-Trial Order, the parties stipulated that the Peripheral Canal was a " 'project' having a 'significant effect on the environment' " within the meaning of the California Environmental Quality Act. See Agreed Pre-Trial Order, § 3.44.

until 1968 when the Peripheral Canal Feasibility Report was completed. That report was accompanied by a recommendation from the Commissioner of the Bureau of Reclamation that the Secretary of the Interior adopt the report. Subsequently, on July 3, 1969, an Assistant Secretary of the Interior adopted and approved the report. That report proposed construction of the Peripheral Canal as a joint-use project of the federal and state governments to transfer water across the Delta. It discussed the need for such a facility, the basic engineering requirements, the benefits to be derived from its use, and set out a financial analysis of its cost. Additionally, the Feasibility Report proposed that the cost of the Canal be allocated on a 50-50 basis between the state and federal governments. Although the Feasibility Report has never been submitted to Congress, the Bureau of Reclamation has never given the Department of Water Resources any indication that the federal government would not participate in the financing of the construction of the Peripheral Canal nor has the Bureau of Reclamation withdrawn its recommendation which accompanied the Feasibility Report. Nothwithstanding the nonexistence of a formal agreement between the state and federal governments *vis a vis* the construction and use of a Peripheral Canal, there existed a common understanding that the Canal would be a mutual undertaking of both the Department of Water Resources and the Bureau of Reclamation.[55] The personnel of those agencies meet periodically to discuss each other's needs with respect to the Peripheral Canal so that the Department of Water Resources can accommodate federal needs. In the absence of direct federal authorization or funding of the construc-

55. The Director of the Department of Water Resources testified that he was proceeding on the assumption that the Peripheral Canal would be a joint use facility of the state and federal governments.

tion of the Peripheral Canal, it is quite possible that the state will enter into a wheeling contract[56] with the federal government, and such a contract could be tantamount to joint funding.[57] On the record before the Court, then, it is not possible to determine whether the federal government will participate in either the construction or the operation of the Peripheral Canal.

[38] Even if the Bureau of Reclamation does not participate in the construction and operation of the Canal, its participation in the planning phase may constitute sufficient participation in the project to activate the NEPA require-

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56. A wheeling contract is merely an arrangement whereby the federal government would pay the state charges for the use of part of the Canal's capacity to transport federal water.

57. If there is a wheeling contract, the federal payments thereunder will flow into the State Water Project Funding Account. It is a plausible inference that any federal payments credited to the Funding Account would be used both to service the debt responsible for providing funds to construct the Peripheral Canal and to pay operation and construction expenses of the Canal. A wheeling contract could provide for short-term use of the Peripheral Canal by the Bureau of Reclamation while the federal government developed its own facility or made some alternative arrangements to meet its obligations with respect to supplying federal water to the Central Valley. Such an arrangement would not be equivalent to a joint funding of the Canal. However, if the contract provided for federal use of the Canal which approached the physicial life of the Canal, and if the amount of the annual wheeling charge approached an amount representing the sum of those annual operation expenses allocable to federal use of the Canal and that amount necessary to repay the imputed federal share of the Canal's cost assuming an appropriate interest rate and amortization of that share of the cost over a given period of time (*i. e.*, either the physical life of the Canal or the life span of any securities used by the state to finance the Canal, then such a wheeling contract might be equivalent to a joint funding of the Canal. As it has been recognized that lease arrangements are forms of financing, in the instant case a wheeling contract containing certain terms could be a form of financing. Accordingly, if the Bureau of Reclamation withdraws from the project and decides to utilize the Peripheral Canal by means of a wheeling contract, this Court will have to decide whether the terms of that arrangement make it equivalent to a joint funding of the Canal or represent mere short-term use.

ments of an EIS. It is clear from the trial record that the Bureau of Reclamation is more than a mere neutral observer in the Peripheral Canal project. It was the moving force pushing forward the initial development plans, its recommendation of joint participation in the project was approved by the Secretary of the Interior,[58] and it has expended over $750,000 on the planning of the project. Although this expenditure of money alone may not constitute major federal action in light of the large cost of the entire project, it must be seen in connection with two other factors. As recommendations of this nature move up through the federal bureaucracy, they develop an irreversible momentum and result in the irretrievable commitment of resources, particularly in the form of planning and development funds. Bureaucrats develop vested interests in positions adopted at early stages, and it becomes more likely that an EIS prepared at the end of the bureaucratic chain will be nothing more than a posthoc rationalization of prior development. *See Jones v. District of Columbia Redevelopment Land Agency,* 162 U.S.App. D.C. 366, 499 F.2d 502, 511 (1974). To allow a federal agency to provide all the impetus for planning and development of a project, to fund a portion of this development process although significantly smaller than the funds expended by the state, and to lobby actively in support of that project, and not to require that agency to file an EIS could result in a subversion of the policies underlying NEPA. In view of the independent ground for an EIS in this case, however, discussed below, and because the Bureau of Reclamation's staff is presently preparing an EIS, the Court need not reach this issue.

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58. See Plaintiffs' Exhibit 14. On July 3, 1960, Assistant Secretary of the Interior James R. Smith approved and adopted the Bureau's feasibility expert on the Peripheral Canal.

2. *The Issuance of Section 9 and 10 Permits*

[39, 40] The Court's holding that the construction and operation of the Peripheral Canal will require the defendants to comply with Sections 9 and 10 of the Rivers and Harbors Act of 1899[59] provides the second basis of major federal action with respect to the Peripheral Canal. The issuance of either a Section 9 or 10 permit pursuant to the Rivers and Harbors Act of 1899 always constitutes major federal action and unless the Corps of Engineers or the Department of the Army makes the negative determination that the issuance has no significant effect on the environment, an EIS is required. *See Davis v. Morton,* 469 F.2d 593, 597-598 (10th Cir. 1972); *Citizens for Clear Air, Inc. v. Corps of Engineers,* 349 F.Supp. 696, 707-708 (S.D.N.Y. 1972); *Kalur v. Resor,* 335 F.Supp. 1 (D.D.C.1971). *Cf. Scientists' Inst. for Public Information, Inc. v. AEC,* 156 U.S.App.D.C. 395, 481 F.2d 1079 (1973); CEQ Guidelines § 1500.5. It is irrevelant that the project may be neither federally financed nor constructed under the auspices of a federal agency. The key factor is that without federal approval (*i. e.,* in this case a federal permit) the project could not commence, and thus the federal action (*i. e.,* issuing the permit) has as much effect on the environment as federal funding would have. In *Scientists' Inst. for Public Information, Inc. v. AEC, supra,* 481 F.2d at 1091, the court went so far as to hold that *development of a new technology* by a federal agency which would permit private companies to construct facilities having a significant effect on the environment was by itself major federal action requiring compliance with NEPA's EIS requirement. Thus, before the Corps can issue Section 9 and 10 permits for the Peripheral Canal, an EIS must be filed.

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59. See p. 632, *supra.*

[41] Since the Corps of Engineers is taking major federal action by issuing the permits, normally it would be required to prepare an EIS. However, here where the Bureau of Reclamation has already begun preparation of an EIS, the Court will not require the Corps to duplicate the efforts of the Bureau of Reclamation as long as the Bureau completes preparation of the EIS prior to the issuance of Section 9 or 10 permits by the Corps.[60] Should the Bureau of Reclamation cease preparation of the EIS, then that obligation would devolve upon the Corps.

B. *The Delta and Tracy Pumping Plants*

[42] With respect to the Delta and Tracy Pumping Plants, it is convenient to distinguish the operation of these facilities up to their present maximum capacities from any future expansion of the two facilities. In regard to the former, plaintiffs vigorously assert that because total annual pumping at both structures will increase in future years to reach their present maximum capacities, these

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60. In *Jones v. District of Columbia Redevelopment Land Agency, supra,* 499 F.2d at 511, the court held that where an urban renewal plan would be passed upon by three different federal agencies. NEPA required all three agencies to prepare an EIS. An EIS is expensive to prepare and to require both the Corps of Engineers and the Bureau of Reclamation to prepare an EIS on the same project would result in a duplication of effort and unnecessary duplicative expenditures of money. Although it could be argued that two EISes would paint a more balanced and objective picture of the environmental impact of the project, it seems unlikely that the incremental increase in objectivity due to the second EIS outweighs the cost of preparation of a second statement. The essence of *Jones* is not that every agency prepare an EIS, but rather that an EIS be prepared at that first point in the decision-making process where there is major imput by a federal agency. If the Bureau of Reclamation continued to participate in the Peripheral Canal project, then it would clearly be the more appropriate agency to prepare the EIS since it will be the first agency to shape the plans for the Peripheral Canal. In this fashion environmental considerations would enter into and affect the decision-making process at an earlier stage than if the EIS were prepared by the Corps.

increases alone will be sufficient to require the filing of an EIS. The Court finds this assertion untenable. It is neither supported in logic nor by the case law. Although NEPA is applicable to further incremental major federal actions occurring subsequent to its effective date even though a project was initiated prior to that date, once a project is complete, there can be no further major action because at the time of completion, the project was capable of operating at maximum capacity and the agencies intended to operate it at full capacity. *See generally Morris v. TVA*, 345 F.Supp. 321, 324 (N.D.Ala.1972). See CEQ Guidelines § 1500.13. If NEPA were construed to require application to ongoing projects which were fully completed prior to January 1, 1970, most federal agencies would become trapped in an endless web of EIS paperwork. Such an interpretation was not intended by Congress and is not supported by the case law.[61]

[43, 44] Nonetheless, an EIS will be required in this case, because both the Tracy and Delta Plants were constructed and are now operated in violation of Section 10 of the Rivers and Harbors Act of 1899 and Section 10 permits must be obtained in order to continue their operations. In considering these applications, the Corps of Engineers and the Department of the Army should consider the advisability of setting operational limitations on export

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61. The logic of plaintiffs' position would require all on-going projects to be assessed even though there may be no future major action otherwise to subject those projects to the EIS requirement. Such a result could be agreed to be consistent with the objectives of NEPA in that, given the fixed cost of a totally completed project, where the benefits of shutting down the project outweighed all of the costs of the project, the project should be curtailed. However, plaintiffs' position is without support either in NEPA or in the cases construing it.

pumping by the two plants.[62] An agency which violates the law by failing to obtain the necessary permits in accordance with the Rivers and Harbors Act of 1899 proceeds at its own peril and must suffer the consequences of later having to obtain those permits when the standards for their issuance are more stringent. Because these permits will be issued after the effective date of NEPA, the issuing agencies will have to file an EIS prior to issuance, as the issuance of the permits will constitute major federal action significantly affecting the environment. When they comply with NEPA, the federal agencies may take into account the present existence of the Delta and Tracy Plants. In considering operation of those facilities, however, future operational decisions must be shaped so as to minimize adverse environmental consequences, and to the extent practicable they must comply with the EIS procedure. These Section 10 permits must be obtained not to validate the past unlawful construction and operation of these two facilities, but rather to insure that future operation is in accordance with the law.

[45-47] With respect to any future expansion of the Delta[63] or Tracy[64] plants, an EIS may be required. In the

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62. It may well be that after consideration of all environmental and other factors, the Corps will want to establish certain periods of the tidal cycle or year when pumping should be curtailed or should be continued at a lower rate. Another possible limitation might be the establishment of an objective test, based upon such factors as the amount of salinity in the Delta waters at various locations, which could be applied on a regular basis and which would set the operational limits.

63. The Department of Water Resources estimates future water transmission by the State Water Project through the Delta Plant will increase to 1,723,000 acre-feet by 1980, 3,579,000 acre-feet by 1990, and 4,353,000 acre-feet by 2020. The testimony was undisputed that the present maximum pumping capacity of the Delta Plant (6300 cfs) would have to be increased in order for the State to meet contractual obligations. Mr. Teerink, Director of the

case of the Delta Plant, the state facility, if the Department of Water Resources installs the four additional pumps at the Delta Plant, as is presently planned, that agency will need to obtain a Section 10 permit prior to the commencement of installation and, consequently, the Corps of Engineers will be required to file an EIS if it determines that the expansion in capacity will have a significant effect on the environment. It will be no defense that the original project was initiated and completed prior to January 1, 1970, as any future expansion of pumping facilities and issuance of a Section 10 permit with respect thereto will constitute either future incremental major action of an ongoing project or new major federal action and may require an EIS before the agencies can proceed. See *Jicarilla Apache Tribe of Indians v. Morton,* 471 F.2d 1275, 1282-1283 (9th Cir. 1973); *Arlington Coalition on Transportation v. Volpe,* 458 F.2d 1323, 1331 (4th Cir. (1972); *Keith v. Volpe,* 352 F.Supp. 1324, 1332 (C.D.Cal. 1972), *aff'd. sub nom. Keith v. California Highway Commission,* 506 F.2d 696 (9th Cir. 1974); *Morningside-Lenox Park Ass'n v. Volpe,* 334 F.Supp. 132, 144 (N.D.Ga.1971). No exemption from NEPA's requirements arises even if

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Department of Water Resources, testified that the present maximum capacity was approximately ⅔ of the future contractual obligation. The present annual maximum pumping capacity of the Delta Plant is 4,599,000 acre-feet. This capacity is inconsistent with Mr. Teerink's testimony and would also seem to be inconsistent with any need to add four additional pumps to the Delta Plant in view of the Department's estimates of future water transmissions by the State Water Project.

64. The rate of export pumping of Delta waters by the Tracy and Delta Plants will increase from 3,388,000 acre-feet to approximately 7,000,000 acre-feet in 1990, and approximately 7,750,000 acre-feet by 2020. The figure for 1990 assumes the completion of all related federal and state projects, including the Peripheral Canal. It is expected that by 2020, the federal government will be exporting 4,087,000 acre-feet per annum through the Tracy Plant. In order to double approximately the federal export rate, either the Tracy Plant would have to be enlarged or a supplemental pumping facility would have to be constructed, as the present maximum capacity of the Tracy Plant is only 3,400,000 acre-feet per annum if all six units are available 365 days a year.

it were impractical to reassess the basic course of action of the original project. See *Jicarilla Apache Tribe of Indians v. Morton, supra,* 471 F.2d at 1282-1283. The agency required to file the EIS must still act so as to minimize any adverse environmental consequences of remaining portions of the project "to the maximum extent practicable". Where part of a project subject to the NEPA requirements has been constructed prior to the effective date of NEPA, then the cost of activity completed prior to the NEPA effective date is merely one additional factor to be weighed in applying cost-benefit analysis to determine the course of future incremental major actions subject to NEPA. Thus, in the case of a project where all major federal action is post-NEPA, an EIS is required to the *fullest extent possible,* while where some major federal action occurred pre-NEPA, an EIS is required to the *maximum extent practicable* as to major federal actions taken after January 1, 1970. *See Jicarilla Apache Tribe of Indians v. Morton, supra,* 471 F.2d at 1282-1283; *Environmental Law Fund v. Volpe,* 340 F.Supp. 1328, 1332 (N.D.Cal.1972).

In the case of the Tracy Plant, the federal facility, if the Bureau of Reclamation attempts to expand its pumping capacity, both the expansion itself and the issuance of a Section 10 permit authorizing that expansion will require an EIS.[65]

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65. Here the expansion of the capacity at the Tracy Plant would constitute major federal action and the responsible federal official would be associated with the Bureau of Reclamation. The action of the Secretary of the Army (or the Corps) with respect to the issuance of the Section 10 permit would not require him to prepare an EIS since its scope would be identical to that prepared by the Bureau of Reclamation. See p. 645, *supra.* In contrast the major federal action involved with the expansion of the capacity of the Delta Plant would be the issuance of the Section 10 permit and the responsible federal official, the Secretary of the Army (or the Corps), would have to prepare an EIS.

C. *Timing of the EIS*

[48, 49] Finally, the timing of any required EIS for the three structures considered here merits some mention. Any EIS which is required because of the issuance of Section 9 and 10 permits should be drafted and completed well in advance of the commencement of the Corps' decision-making process. See *Greene County Planning Board v. FPC, supra,* 455 F.2d at 421-422. Although we do not set forth explicit requirements with respect to the timing of the EIS by the instant agencies, they should be guided by the statement of the court in *Jones v. District of Columbia Redevelopment Land Agency, supra,* that EISes

> "were not to be merely *post hoc* environmental rationalizations of decisions already fully and finally made. Rather their purpose is to ensure 'meaningful consideration of environmental factors at all stages of agency decision making,' and to inform both the public and agencies implicated at subsequent stages of decision-making of environmental costs of the proposal." 499 F.2d at 511.

This statement also applies to the timing of any EIS that must be filed on the part of the Bureau of Reclamation due to its participation in the Peripheral Canal project. It is clear beyond cavil that an EIS would be required considerably prior to the first day of construction activity.[66] *Cf. Environmental Law Fund v. Volpe, supra,* 340 F.Supp. at 1332-1333; *Morningside-Lenox Park Ass'n v. Volpe, supra,* 334 F.Supp. at 142-144.

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66. At the outset of the trial, and the initial briefs and memoranda filed with this Court, defendants asserted that the law imposed no duties presently as to the Peripheral Canal because its construction was not imminent. It was even contended that the likelihood of its being constructed at all was highly speculative. During trial, however, the parties abandoned that position, as the evidence proved that not only was the construction of the Canal imminent but that many activities certainly preparatory to the construction (if not construction itself) had been going on for some

V. CALIFORNIA ENVIRONMENTAL QUALITY ACT

[50] Plaintiffs' sixth claim for relief alleges that the construction of the proposed Peripheral Canal, the proposed future increases in the volume of water to be pumped

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time. The Director of Water Resources, Mr. Teerink, stated that the state would build the Canal and was planning to commence construction late in 1975. He estimated completion by 1980. In order to meet that schedule, preconstruction activity (*e. g.*, right of way work, engineering studies) was presently underway.

The Department of Water Resources has officially adopted the Peripheral Canal as the Delta water facility of the State Water Project. Development and planning of the Peripheral Canal began at some point prior to 1965 and proceeded up to the date of the trial. This development work included the acquisition of land as a portion of the right of way, the initial design work, and commencement of the final design work including the preparation of contract drawings and construction specifications. In this connection, the state had expended through 1973 in excess of $6,627,000 on planning and development and in excess of $2,275,000 in connection with right-of-way acquistions and the purchase of land. Furthermore, the federal government had spent over $750,000 through March 31, 1974, on activities associated with the planning of the Canal. At present the Department of Water Resources has approximately 45-50 people involved with the design group working on the plans for the Canal. Finally, on January 18, 1968, the California Department of Public Works Division of Highways and the Department of Water Resources executed an agreement whereby the Department of Public Works would advance $2,000,000 to the Department of Water Resources so that it could acquire right of way for four segments of the Peripheral Canal sufficient to provide up to 7,000,000 cubic yards of borrow material from the canal prism. Pursuant to this agreement, contractors' bidding on the construction of Interstate 5 (I-5) would then be required to use those portions of the Peripheral Canal right of way as a mandatory borrow site for highway fill. The purpose of this agreement was to coordinate the construction of I-5 and the Peripheral Canal. Although I-5 bids were received in December of 1973, none had been accepted as of the date of the trial.

In *Friends of Earth v. Coleman,* 513 F.2d 295, 300 (9th Cir. 1975), the court held that the proposed I-5 excavations out of the proposed Peripheral Canal right of way would not constitute a commencement of the Canal project sufficiently significant to warrant formal NEPA evaluation of the Canal's environmental impact. The court did state that "an EIS will be required before any work on the canal beyond highway fill excavations can be done." *Ibid.* at 300.

through the Delta and Tracy Plants, and the proposed modifications to the Delta Plant necessary to accommodate such increases will violate the California Environmental Quality Act (CEQA),[67] unless adequate environmental impact reports (EIR) are first prepared by the responsible state agency.[68]

Sections 21000 and 21001 of CEQA contain a declaration of California's general environmental policy. Section 21100 requires that state agencies prepare an environmental impact report on any project they propose to carry out or approve which may have a significant effect on the environment.[69] "Project" is defined in Section 21065.[70] Section

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67. California Public Resources Code, § 21000 *et seq.*

68. State defendants' assertion that the CEQA claim is barred by Section 21167(a) is without merit. That section provides:

"Any action or proceeding to attack, review, set aside, void, or annul the following acts or decisions of a public agency on the grounds of noncompliance with this division shall be commenced as follows:

"(a) An action or proceeding alleging that a public agency is carrying out or has approved a project which may have a significant effect on the environment without having determined whether the project may have a significant effect on the environment shall be commenced within 180 days of the public agency's decision to carry out or approve the project, or, if a project is undertaken without a formal decision by the public agency, within 180 days after commencement of the project." The amendment adding the CEQA claim related back to the filing of the complaint as the CEQA claim arose out of the same transaction and involves the same defendants. Fed.R.Civ.P. 15(c).

69. Section 21100 provides:

"All state agencies, boards, and commissions shall prepare, or cause to be prepared by contract, and certify the completion of an environmental impact report on any project they propose to carry out or approve which may have a significant effect on the enivironment. Such a report shall include a detailed statement setting forth the following:

"(a) The environmental impact of the proposed action.

"(b) Any adverse environmental effects which cannot be avoided if the proposal is implemented.

15081 of the CEQA regulations sets forth the factors to be weighted by an agency to determine whether a particular project is such that it "may have a significant effect on the environment".[71]

"(c) Mitigation measures proposed to minimize the impact including, but not limited to, measures to reduce wasteful, inefficient, and unnecessary consumption of energy.

"(d) Alternatives to the proposed action.

"(e) The relationship between local short-term uses of man's enviroment and the maintenance and enhancement of long-term productivity.

"(f) Any irreversible environmental changes which would be involved in the proposed action should it be implemented

"(g) The growth-inducing impact of the proposed action."

70. Section 21065 provides:

"'Project' means the following:

"(a) Activities directly undertaken by any public agency.

"(b) Activities undertaken by a person which are supported in whole or in part through contracts, grants, subsidies, loans, or other forms of assistance from one or more public agencies.

"(c) Activities involving the issuance to a person of a lease, permit, license, certificate, or other entitlement for use by one or more public agencies."

71. Section 15081 provides in pertinent part:

"(a) The determination of whether a project may have a significant effect on the environment calls for careful judgment on the part of the public agency involved, based to the extent possible on scientific and factual data. An iron clad definition of significant effect is not possible because the significance of an activity may vary with the setting. For example, an activity which may not be significant in an urban area may be significant in a rural area. There may be a difference of opinion on whether a particular effect should be considered adverse or beneficial, but where there is, or anticipated to be, a substantial body of opinion that considers or will consider the effect to be adverse, the lead agency should prepare an EIR to explore the environmental effects involved.

"(b) In evaluating the significance of the environmental effect of a project, the lead agency shall consider both primary or direct and secondary or indirect consequences. Primary consequences are immediately related to the project (the construction of a new treatment plant may facilitate population growth in a particular area), while secondary consequences are related more to primary consequences than to the project itself (an impact upon the resource base, including land, air, water and energy use of the area in question may result from the population growth).

The California Supreme Court has noted the similarity of CEQA and NEPA and stated that interpretations of NEPA are relevant in construing similar terms in CEQA. *Friends of Mammoth v. Board of Supervisors of Mono County,* 8 Cal.3d 247, 104 Cal.Rptr. 761, 502 P.2d 1049, 1058 (1972). One federal court has held that CEQA was deliberately modeled after NEPA and that therefore the same considerations govern the applicability of the two acts to the same projects. *Keith v. Volpe, supra,* 352 F.Supp. at 1337. Accordingly, most of the principles discussed *supra* with regard to NEPA are applicable to our consideration of the duties imposed upon defendants with respect to CEQA.

In the Agreed Pre-Trial Order the defendants stipulated that the Peripheral Canal was a project which may have a significant effect on the environment.[72] In fact, the state

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"(c) Some examples of consequences which may have a significant effect on the environment in connection with most projects where they occur, include a change that:

"(1) Is in conflict with environmental plans and goals that have been adopted by the community where the project is to be located;

"(2) Has a substantial and demonstrable negative aesthetic effect;

"(3) Substantially affects a rare or endangered species of animal or plant, or habitat of such a species;

"(4) Causes substantial interference with the movement of any resident or migratory fish or wildlife species;

"(5) Breaches any published national, state, or local standards relating to solid waste or litter control;

"(6) Results in a substantial detrimental effect on air or water quality, or on ambient noise levels for adjoining areas;

"(7) Involves the possibility of contaminating a public water supply system or adversely affecting ground water;

"(8) Could cause substantial flooding, erosion or siltation;

"(9) Could expose people or structure to major geologic hazards." 14 Cal.Admin.Code, § 15081.

72. See Agreed Pre-Trial Order, § 3.44.

defendants issued a draft Environmental Impact Report on the Peripheral Canal project in August of 1974. That draft is being circulated for comments and criticism, and then a final Environmental Impact Report will be prepared. In view of the imminence of this report the Court will offer only a few observations.

[51, 52] At present no Environmental Impact Report is required with respect to the Delta Plant as that facility was completed prior to the effective date of CEQA. Before expanding that facility by installing additional pumps, however, the state defendants will have to comply with CEQA.[73] There is no merit to plaintiffs' contention that increased pumping by the presently existing facility requires compliance with CEQA. Plaintiffs' reliance on *County of Inyo v. Yorty*, 32 Cal.App.3d 795, 108 Cal.Rptr. 377 (1973), is misplaced as in that case there was construction of additional pumping and extraction facilities in ad-

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73. See 14 Cal.Admin.Code, § 15070, which provides in pertinent part:

> "(a) A project as defined in Section 15037(a)(1) of these Guidelines, approved prior to November 23, 1970, shall require an Environmental Impact Report or a Negative Declaration if the project may have a significant effect on the environment, and either of the following conditions exists:
>
> "(1) A substantial portion of public funds allocated for the project have not been spent and it is still feasible to modify the project to mitigate potentially adverse environmental effects, or to choose feasible alternatives to the project, including the alternative of 'no project' or halting the project; provided that this Section (1) shall not apply to projects which come under the jurisdiction of the National Environmental Policy Act (NEPA) and which, through regulations promulgated under NEPA, were held to be too far advanced at the time of NEPA's effective date to require an EIS in compliance with those regulations.
>
> "(2) A public agency proposes to modify the project in such a way that the project might have a new significant effect on the environment."

dition to expanded pumping at presently existing facilities. Finally, no Environmental Impact Report will be required for the Tracy Plant since that is a federal facility and thus not subject to CEQA.

The foregoing constitutes the Court's Findings of Fact and Conclusions of Law as required by Rule 52(a) Federal Rules of Civil Procedure.

It is hereby ordered that the state defendants shall obtain authorization to operate the Delta Pumping Plant in the manner prescribed in Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, by the date established by this Court at the hearing to be held on September 4, 1975, as more fully set forth below.

It is hereby further ordered that the federal defendants shall obtain authorization to operate the Tracy Pumping Plant in the manner prescribed in Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403, by the date established by this Court at the hearing to be held on September 4, 1975, as more fully set forth below.

It is hereby further ordered that the Secretary of the Army or his delegate shall prepare and file an Environmental Impact Statement pursuant to 42 U.S.C. § 4332 with respect to issuance of any Section 10 permits authorizing the operation of the Tracy Pumping Plant and the Delta Pumping Plant prior to the issuance of any such permits.[74]

It is hereby further ordered that all parties shall appear before this Court at 1:30 P.M. on September 4, 1975, in

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74. Nothing in this order shall be construed to prohibit the federal defendants from preparing and filing one document to serve as an Environment Impact Statement for the Tracy Pumping Plant, the Delta Pumping Plant, and the Peripheral Canal as long as any such document meets the requirements of 42 U.S.C. § 4332, and as long as legally imposed deadlines are met.

order to determine a date by which the state and federal defendants must obtain authorization of the operation of the Tracy and Delta Pumping Plants under Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 403.

It is hereby further ordered that with respect to the Peripheral Canal, as presently proposed, no construction work shall begin prior to the receipt of authorization under Sections 9 and 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401, 403, and that no Section 9 or 10 permits may be issued with respect to the Peripheral Canal, as presently proposed, without the prior preparation and filing of an Environmental Impact Statement by the Secretary of the Army or his delegate pursuant to 42 U.S.C. § 4332. If the Bureau of Reclamation completes preparation of an Environmental Impact Statement with respect to the Peripheral Canal, then that report may be filed in lieu of the Environmental Impact Statement required by this order with respect to the Canal and that filing will obviate the need for such a filing by the Secretary of the Army.

It is hereby further ordered that with respect to the Peripheral Canal, as presently proposed, no construction work shall commence until the Department of Water Resources prepares and files an Environmental Impact Report pursuant to California Public Resources Code § 21100.[75]

It is hereby further ordered that plaintiffs' second, third and fifth claims are dismissed with prejudice.

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75. Nothing in the Memorandum of Opinion shall be construed to prohibit the defendants from preparing one document to serve as both the Environmental Impact Statement and Environmental Impact Report as long as that one document meets the requirements of both 42 U.S.C. § 4332 and California Public Resources Code § 21100. Nor should anything in this Memorandum of Opinion be construed to preclude any consolidation of the work effort on the part of defendants in the preparation of the necessary Environmental Impact Statement and Environmental Impact Report to the extent that such a consolidation would result in avoidance of repetitious work by defendants.

Supreme Court, U. S.
FILED
NOV 14 1980
MICHAEL RODAK, JR., CLERK

Nos. 79-1252 and 79-1502

Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF CALIFORNIA *et al.*,
Petitioners,

v.

SIERRA CLUB *et al.*,
Respondents.

KERN COUNTY WATER AGENCY, *et al.*,
Petitioners,

v.

SIERRA CLUB *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR CERTIORARI IN NO. 79-1252 FILED FEBRUARY 13, 1980.
PETITION FOR CERTIORARI IN NO. 79-1502 FILED MARCH 17, 1980.
CERTIORARI GRANTED OCTOBER 6, 1980.

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DOCKET ENTRIES (District Court)

UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SIERRA CLUB
Plaintiffs

vs.

ROGERS C. B. MORTON
Defendants

No. C-75-500 SAW (13)

Filing or Order Date		Proceedings	Date Order or Judgment Noted
1971			
Mar. 16	1.	Filed complaint, no process	
Mar 17		Issued Summons	
Apr. 7	2.	Filed summons ret. ex.	
	3.	Filed No. Mo. & Mo. for ext time to ans comp. by STATE of CALIF. Hrg.5/20 2:15	
May 0		ORD; deft mo to ext time for ans GRTD. SAW	
	4.	Filed Stip & Ord. ext time for USA to ans thru 6/20	SAW
	5.	Filed ORD. ext time thru 6/20 for St. Calif. to ans SAW	
May 24	6.	Filed proof of ser of Ord. ext time to 6/20	
June 3	7.	Filed pltfs Sierra first request for production of documents by Fed defts	
	8.	Filed pltfs Sierra first request for production of documents by State defts	
June 21	9.	Filed notice of Mo. & Mo. to dismiss, set for August 5, 1971 at 2:15P.M.	
June 21	10.	Filed notice * Motion to dismiss complaint set for August 5, 1971 at 2:15P.M. $	
July 7	11.	Filed STATE OF CALIF. objections to pltf's 1st req. for documents	
July 8	12.	Filed USA ans. and objections to pltf. 1st req for documents	
July 9	13.	Filed deft. supplementary ans. & objections to pltf. 1st req. for documents	
July 23	14.	Filed Stip. & Ord. Con motion to dismiss to Sept. 2, 1971 at 2:15 P.M. SAW	
Aug 6	15.	Filed No. of Mo. and Mo. to compel prod of docums hrg 9/2 2:15	

Filing or Order Date		Proceedings	Date Order or Judgment Noted
1971			
Aug 16	16.	Filed Memo. in opposition to Pltffs Mo to compel Prod. of Doc.	
Aug 25	17.	Filed Notice of re-setting hrg. to 9/9/71	SAW
Sept 1	18.	Filed deft Memo. in opp. to, Mo. to compel prod of docums.	
Sept 7	19.	Filed Stip & Ord. cont hrg on mos to 9/23 2:15	SAW
Sept 23	20.	Filed Stip. cont hrg on Mos to 10:21 2:15	SAW
Oct 12	21.	Filed pltf. brief in opp to deft Mo. to dism	
	22.	Filed pltf. memo. in opp to deft Mo. to dism & suppl. memo. in sup of Mo. for prelim. inj.	
Oct 21		Ord after hrg. Deft Mo to dismiss complaint as to United States & State Defts Denied without prejudice, Pltff Sierra Club Mo to compel production referred to Magistrate Woodruff for Hrg.	SAW
Nov 5	23.	Filed sub of attys. for pltf SIERRA CLUB. Gerald K. Gleason for R. Frederic Fisher	
Nov 16	24.	Filed pltf. No. of Mo. to compel prod of docums hrg 12/3 10:00	
Nov 19	25.	Filed St. of Calif. interrogs to SIERRA CLUB	
Nov 19	26.	Filed 1st set of interrogs of State of Calif to Pltff Friends of the	
Dec 10	27.	Filed ans of USA defts.	
Dec 16	28.	Filed ans of pltf SIERRA CLUB to interrogs of ST. of Calif.	
Dec 23	29.	Filed amendment to ans of USA	
1972			
Jan 5	30.	Filed 2d amendment to USA ans.	
Jan 10	31.	Filed ans to comp by State defts.	
Feb 3		Case assigned to Judge Renfrew	
Feb 4	32.	Filed Findings of facts & conclusions of law re prod of documents	
Feb 24	33.	Filed State defts' not. pursuant to Ord to Produce	
Feb 28	34.	Filed pltf's substn of attys	
Mar 31	36.	Filed State of Calif. Defts' first interrogs to Pltffs.	
	36.	Filed State of Calif Defts' First interrogs to Pltfs.	
	37.	Filed State of Calif. Defts' First interrogs to Pltifs.	
	38.	Filed State of Calif Deft's first interrogs to Pltfs.	
Apr 5	39.	Filed State of Calif. Defts' 1st interrogs to Pltfs.	
Apr 26	40.	Filed Stip that plfts may have to May 30 1972 to answer interrogs.	
Jun 1	41.	Filed Plfs Hank Schramm answers to interrogs.	
	42.	Filed Pltf Sierra Club Answers to Interrogs.	
Aug 10	43.	Filed Reporter's transcript, Oct 21. 1979.	
Oct 12	44.	Filed Answers to interrogs.	
Oct 31	45.	Filed Pltfs' first interrogs to state of Calif Defts.	
	46.	Filed Plitfs first interrogs to Federal Defts.	
Dec 6	47.	Filed Stip for ext of time to Jan 5, 1973 to ans pfts 1st interrogs.	
Dec 19	48.	Filed Stip & ord that Deft State of Calif. Norman B. Livermore Jr. may have to Jan 1, 1973 to ans Pltfs' 1st interrogs.	

Filing or Order Date		Proceedings	Date Order or Judgment Noted
1973			
Mar 22	49.	Filed Answer to Plifs first interrogs to Federal Defts.	
Apr 11	50.	Filed pltfs no of mo to compel ans to interr along with memo of pts & auth & affts	
Apr 17	51.	Filed defts ans to pltfs 1st interr	
Apr 26	52.	Filed deft ans to pltfs 1st set of interr (State defts)	
Sept 20	53.	Filed notification of change of address & firm name	
Oct 3	54.	Filed Clerk's notice of Status report set for Oct 17-73 at 9:00a.m.	
Oct 9	55.	Filed Status report.	
Oct 9	56.	Filed Status report. Certificate of counsel.	
Oct 9	57.	Filed Certificate of Counsel by attorneys for Sierra Club this document forwarded to Hon	CBR
Oct 17		Ord. Status report; prelim pre-trial conf set for 1-9-74 at 9:00am; set for 5 days trial by court on 6-3-74 at (9:00am)	
Nov 16	58.	Filed Pltf's second Req. for prod. of Doc.	
Dec 12	59.	Filed Deft's resp. to Pltf's sec. set of req. for prod of docs.	
Dec 20	60.	Filed Deft's not. of mo and mo for Order upon failure to make disc. to be heard 1-9-74/9:30am	
	61.	Filed Dept's not of mo and mo to dismiss complaint to be heard 1-9-74/9:30am	
Dec 21	62.	Filed ORD shortening time; that Fed. deft's may have until 12-31-73 within which to file their not. of mo and mo to dismiss the complaint and the first amended complaint, which the parties have stip. may be filed herein, said mos to be heard on 1-9-74.	CBR
	63.	Filed Deft's not. of mo and mo to dismiss complaint and first amended complaint.	
	64.	Filed Deft's Interrogs to Pltf.	
Dec 27	65.	Filed Stip & ORD; that pltf's proposed First amended Complaint may be filed without formality of a mo.	CBR
	66.	*Filed First Amended Complaint* for Declaratory and Infunctive relief.	
1974			
Jan 3	67.	Filed Not. to counsel of hrg date of 1-10-74/9am	
Jan 10	68.	Filed Stip & ORD; that the date set for hrg of mos in this case may be rescheduled to 2-13-74/9am	CBR
Feb 1	69.	Filed Fed. Deft's supp'l memo of pts and author. in supp. of mo dismiss.	
	70.	Filed Pltf's memo in opp. to mo of Fed deft's to dismiss the first amended complaint.	
	71.	Filed Pltf's memo in opp. to State Deft's mo to dism.	
	72.	Filed Pltf's ans to interrogs of fed defts.	
	73.	Filed pltf's supp'l affidavit in opp. to mos to dismiss.	
Feb 12	74.	Filed Pltf's Joinder and adoption of Supp'l opp' ot defts mo to dismiss.	
Feb 13	75.	Filed Correction of fed. defts' resp. to pltf's sec set of reqs for prod. of docs.	

Filing or Order Date		Proceedings	Date Order or Judgment Noted
1974			
Feb 13		ORD Fed. defts mo to dismiss complaint and 1st amended complaint & State defts mo to dismiss complaint—Both Denied; cont'd to 2-22-74/4:30pm for pretrial;	CBR
March 12	6.	Filed ORD; that Magist Woodruff is hereby ordered and directed to: Assist in the conduct of P/T and idsc. Proc.; Assist the parties in the preparation of a P/T ORD; etc See ORD for more details;	CBR
March 14	77.	Filed NOt. that the matter was referred to Magist Court and is calendared for hrg on 3-21-74/2pm	WOODRUFF
March 15	78.	Filed Kern County Water Agency's not. of mo to intervene as Deft. to be heard 4-10-74/9am	
March 21		ORD; First conf. on proceures to be followed.; Parties ordered to prepare porposedlist of undisputed facts. Next hrg for late Apr. on date to be set by parties.	WOODRUFF
March 29	79.	Filed not. of mo to intervene as deft by The Metro. Water District of Southern Calif. to be heard 4-10-74.	
	80.	Filed Ex Parte Mo to shortentime by Metropolitan Water District	
	81.	Filed ORD shortening not. of hrg on mo to intervene to 4-10-74 at 9am	CBR
	82.	Filed Pltfs memo in opp. to mo to intervene	
April 1	83.	Filed defts Statement of no opp. to mo to intervene (Fed. defts)	
April 8	84.	Filed Not. of mo of Santa Clara Valley Water District to Intervene as Deft to be heard 4-10-74	
	LOD	GED:ANS TO FIRST AMENDED COMPLAINT BY SANTA CLARA VALLEY WATER DISTRICT.	
	85.	Filed Ex Parte mo of Santa Clara Valley Water Dist. & ORD; that that the time of not. for the hrg on the mo to intervene as deft is shortened to permit hrg of said mo 4-10-74/am	CBR
	86.	Filed Proof of service by State of Calif.	
April 9	87.	Filed Memo of Pltfs Sierra Club and Hank Schramm in opp. to mo to Intervene.	
April 10		ORD Kern County Water District's mo to intervene & Metro. Water District of Southern Cal. mo to Intervene and Santa Clara Water District mo to intervene--Granted	CBR
April 12	88.	Filed Tulare Lade Basin Water Storage District's not. of mo & MO to intervene as deft with attached documents to be heard 5-1-74/9am	
April 16	89.	Filed Tulare Lake Basin Water Storage's Ex Parte mo to shorten time with attached cert. of counsel in supp. of mo.	
April 17	90.	Filed Tulare Lake Basin Water's Declaration of Service by Mail	
April 18	91.	Filed ORD shortening not. of hrg on mo to intervene to 4-24-74/9am	
April 24		ORD Tulare Lake Basin Water Storage Dist. mo to Intervene—Granted;	CBR
April 25	92.	Filed Pltfs memo in opp. to mo to intervene	
April 29	93.	Filed Stip and ORD; that the mo of Tulare Lake Basin Water Storage District to intervene as deft is GRANTED;	CBR

Filing or Order Date		Proceedings	Date Order or Judgment Noted
1974			
April 30	94.	Filed Fed. Defts' Third set of Interrogs to pltfs:	
May 2	95.	Filed Stip & ORD;that the mos of the Kern County Water Agency, The Mo Water Dist., and the Santa Clara Valley Water Dist. to intervene as defts in this action are GRANTED, and they are made parties deft action and the ans of said intervenors attached to their mos shall stand as their ans to the first amended complaint.	CBR
May 7	96.	Filed defts not. of mo & mo for P/T conf to be heard 5-17-74/2pm	
May 8	97.	Filed OrD;that defts' not. of mo and mo for p/t conf. may be seved on pltfs five days before the date not'd for said P/T conf.	WOODRUFF
May 17	98.	Filed ANS TO FIRST AMENDED COMPLAINT BY INTERVENOR.	
		ORD; matter not. by defts for an interim p/T conf with an agenda attached Under the first agenda item the parties all agreed that the P/T ord cannot be completed until the court ruled on a defts' mo to dismiss as to certain parties and causes of action presently pending; there was agreement that the trial should be bifurcated and language proposed for inclusion in the p/T ord spelling out the bifurcation.; cont'd until 5-31-74/10am for possible completion of first draft of the final P/T ord.	WOODRUFF
May 29	99.	Filed Pltf William Dixon's ans to defts' first interrogs.	
May 30	100.	Filed Pltfs FRIENDS of the Earth Substitution of Attorneys; John B. Clark in place of Gary J. Near	
	101.	Filed Plts' ans to Fed. defts' Third set of interrogs	
June 6	102.	Filed Fed. defts supp. to ans to pltfs' first interrogs.	
June 7		Ord; Magistrate ruled on a series of Mo and objections; pltf to prepare final P/T ord for signature and approval at 8:00 AM 6-10-74; Trial to begin 9:00AM 6-10-74	WOODRUFF
June 10	103.	Filed Agreed P/T ord respecting the first phase of Bifurcated Trial	CBR
		ORD court Trial; Evidence introduced; cont'd to 6-11-74/1:30pm for further trial	CBR
June 11		ORD; further trial; evidence introduced; Fed. defts' mo for a judgt in favor of Fed. defts on all counts or in the alternative for a mo to dismiss with prej. cont'd to 6-12-74	CBR
	104.	Filed ANS OF STATE DEFTS TO FIRST AMENDED COMPLAINT	
June 12		ORD; further trial; Fed. defts mo for a judgt in favor of Fed. defts on all counts or in the Alternative mo to dismiss with prej Denied w/o prej.; State defts mo to dismiss with respect to delta pumping Pland—Denied w/o prej.; cont'd to 6-17-74/1:30pm	CBR
June 17		ORD; further trial; Evidence introduced; cont'd to 6-18-74/1:30pm	CBR
June 18		ORD; further trial; evidence introduced; Fed. defts mo to admit Fed deft exhibits 14a, 14c, 14d deferred; Pltfs' mo to strike portions of witness Teerink's testimony—Granted; cont'd to 6-19-74/10am	CBR
June 19		ORD further trial; evidence introduced; cont'd to 6-20-74/9am	CBR
June 20		ORD; further trial; Evidence introduced; cont'd to 6-21-74/9am	CBR

Filing or Order Date		Proceedings	Date Order or Judgment Noted
1974			
June 21		ORD; further trial; all briefs to be submitted by 7-19-74; cont'd to 7-26-74/1:30pm for final arguments on the first phase of the bifurcated trial	CBR
July 2	105.	Filed ORD; oral arguments of the parties to be heard 7-26-74/1:30pm	CBR
July 12	106.	Filed Fed. defts proposed findings of fact and conclusions of law.	
	107.	Filed State Defts' Proposed Findings of fact and conclusions of law.	
	108.	Filed Proposed Findings of Fact and Conclusions of Law of Pltfs'	
July 15		LODGED: INTERVENOR KERN COUNTY WATER AGENCY'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW.	
July 17	109.	Filed Erratum in Proposed Findings of Fact and Conclusion of Law of Pltfs Sierra Club, Friends of the Earth and Hank Schramm.	
July 18	110.	Filed ORD; that State defts' Exhibit 3 be admitted into evidence; and that a cert. copy of a letter of 3-28-66 to Chief of Engineers' Depart of Army, etc be admitted into evidence as State defts' exhibit next in ord.	CBR
July 19		LODGED: FED. DEFTS'S POST TRIAL BRIEF AND OBJECTIONS TO PETFS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF	LAW
	111.	Filed Joint Brief of Intervenors.	
	112.	Filed Pltfs' Post-Trial memo	
	113.	Filed State Defts' Brief.	
July 22	114.	Filed Pltf's objections to defts' proposed findings of Fact and Conclusions of law.	
July 24	115.	Filed Pltf William Dixon's Joinder and adoption of proposed finding of fact and conclusions of law and post trial memo	
July 26		Ord; Further tr resumed. Witnesses. Case submitted. Cont'd to 9-27-74 @ 4:30.	CBR
Aug. 20	116.	Filed Pltfs' third req for prod. of docs by Fed. Defts.	
	117.	Filed Pltf's third req for prod. of docs by State Defts.	
Aug. 30	118.	Filed Fed. defts' memo re comments of Court Made of 7-26-74	
Sept. 3	119.	Filed State Defts' memo concerning issues Discussed in oral argument.	
Sept. 5	120.	Filed Intervenors' Memo on Oral Argument.	
Sept. 20	121.	Filed pltf's Status Report.	
	122.	Filed State Defts' memo concerning phase two of the trl	
Oct. 7	123.	Filed state defts' resp. and objections to pltfs' third req for prod. of docs.	
	124.	Filed Fed. defts' objects to pltfs' 3rd req for prod. of docs	
1975			
Feb. 4	125.	Filed Reporter's Transcript of 7-26-74	
July 28	126.	Filed Memo of Opinion	CBR
Sept. 4		ORD: hrg cont to 10-2-75/1:30 pm	CBR
Oct.	127.	Clerk's notice resetting hearing on 11-6-75/2pm to 11-4-75/2pm	CBR

Filing or Order Date		Proceedings	Date Order or Judgment Noted
1975			
Nov. 2	128.	Stipulation & ORDER continuing hearing on 11-4-75 to 12-4-75. at 2pm	CBR
Nov. 26	129.	Federal defendants' Brief in support of their request to enter final judgment	
Dec. 3	130.	Plaintiffs' Memo in opposition to entry of Final Judgment	
Dec. 4	131.	MINUTE ORDER OF 12-4-75: after hearing, continued to 12-19-75/1:30pm for hearing, deemed submitted on 12-19-75 (CBR)	
	132.	Plaintiffs' Memo in opposition to entry of Final Judgment	
Nov. 26		Notice of related case C-75-2508 SW (in C-75-2508 SW)	
Dec. 16	133.	Cases determined not to be related.	
Dec. 18	134.	INTERLOCUTORY ORDER GRANTING INJUNCTIVE RELIEF: plaintiffs' 2nd, 3rd & fifth claims are dismissed with prejudice (CBR) Pending compliance with this Order, Court retains jurisdiction to entertain proceedings in Phase Two of bifucated trial & to make further orders	
Feb 6	135.	Defendants' Livermore & Teerink's Notice of Appeal from Order of 12-18-75	
	136.	Defendant in intervention Kern County Water Agency's Notice of Appeal from Order of 12-18-75	
	13.	Certificate of Clerk to deposit of $250 in lieu of Costs Bond by defendant Kern County	
Feb 1	138.	Designation of Record on Appeal by Appellant Kern County	
	139.	Designation of Record on Appeal by Appellant State	
	140.	Intervenor Metropolitan Water District's Notice of Appeal (Order 12-18-75)	
	141.	$250 Bond on Appeal secured By cash deposit	
	142.	Federal Defendants' Notice of Appeal from Order of 12-18-75	
	143.	Intervenor Tulare Lake's Notice of Appeal from Order of 12-18-75	
	144.	Intervenor Tulare Lake's $250 Personal Bond on Appeal	
17	145.	Intervenor Santa Clara's Notice of Appeal from Order of 12-18-75	
	146.	Intervenor Santa Clara's $250 Personal Bond on Appeal	
Mar. 4	147.	Defendant METROPOLITAN WATER, designation of record on appeal.	
Mar. 5	148.	Appellee's designation of record on appeal.	
Mar 15	149.	Appellant Santa Clara's Designation of record on appeal	
Mar 25		Notice of reproduction costs mailed, $583.50 (each appellant to pay $97.25)	
Mar 29		Received payment for reproduction from Santa Clara Valley	
Mar 26	150.	Appellant Kern County's & State's motion to extend time to transmit record on appeal & ORDER time extended to 5-6-76 (CBR)	
Mar 30		Received payment for reproduction from Kern County	
Mar 31		Received payment for reproduction from State defendants	
Mar 31		Received payment for reproduction from Tulare Lake Basin	
Apr 8		Received payment for reproduction from Metropolitan Water	
Apr 9	151.	Reporter's Transcript of 10-21-71 & 6-26-74, Vol. A, Original &1 copy	

Filing or Order Date	Proceedings	Date Order or Judgment Noted
1975		
	152. Reporter's Transcript of 6-10-74, Vol. I, original & 1 copy	
	153. Reporter's Transcript of 6-11-74, Vol. II, original & 1 copy	
	154. Reporter's Transcript of 6-12-74, Vol. III, original & 1 copy	
	155. Reporter's Transcript of 6-17-74, Vol. IV, original & 1 copy	
	156. Reporter's Transcript of 6-18-74, Vol. V, original & 1 copy	
	157. Reporter's Transcript of 6-19-74, Vol. VI, original & 1 copy	
	158. Reporter's Transcript of 6-20-74, Vol. VII, original & 1 copy	
	159. Reporter's Transcript of 6-21-74 & 9-4-75, original & 1 copy	
May 24	**[certification omitted]**	

DOCKET ENTRIES (Court of Appeals)

United States Court of Appeals

FOR THE NINTH CIRCUIT

SIERRA CLUB, a non-profit California Corporation, *et. al.*, *Plaintiffs-Appellees*	
VS.	Nos. 76-1494;
NORMAN B. LIVERMORE, JR. and JOHN R. TEERINK, *Defendants-Appellants*	76-1534; 76-1651; 76-1663;
KERN COUNTY WATER AGENCY, *et. al.*, *Defendants-In Intervention*	76-1981

For Appellees:
JOHN B. CLARK, ESQ.
and ROBERT THUM, ESQ.

For Appellants:
EVELLE J. YOUNGER,
Atty. Gen. Calif.
CARL BORONKAY,
Assis. Atty.
BERTRAM G. BUZZINI,
Dep. Atty. Gen.

Date	Same record for 76-1494, 76-1534, 76-1651, 76-1663, 76-1981 Filings-Proceedings	Clerk's Fee Appellant	Clerk's Fee Appellee
1976			
March 9	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL —chs—	50.00	
Apr 1	Recvd copy of order filed in Dist. Ct. 3/26/76 granting an ext to time to & including May 6, 1976 for transmitting the record —jc—		
May 3	FILED IN 76-1464 TRANSC RECORD ON APPEAL IN FOURTEEN VOLUMES: VOLS. I-V, PLDGS, ONE CERT COPY & TWO COPIES EACH; VOLS. VI-XIV, RPTRS TRANSC, ONE ORIG. & ONE COPY EACH. ONE BOX IN RM. 210 —cjb—		
	Aplts' brief in 76-1464, due June 19, 1976 —cjb—		

Date	Same record for 76-1494, 76-1534, 76-1651, 76-1663, 76-1981 Filings-Proceedings	Clerk's Fee Appellant	Clerk's Fee Appellee
Jun 18	Filed 25 Aplts' Briefs (Livermoore & Teerink) 6/17/76 —dmf—		
June 21	Filed, in 76-1981, federal aplts' motion for permission to file typewritten copy of brief pending reproduction to (c) with copy of brief —jr—		
June 21	Filed Intervenor-aplt's (Kern County, Tulare Basin Water, Storage, Metropolitan Water Dist of So. Calif. & Santa Clara Valley Water Dist.) motion requesting judicial notice; & memorandum of points & authorities in support of motion. (6/21/76) (to Schickele) —jc—		
June 21	Filed in 76-1494, intervenor-aplts' (Kern County Water Agency, Metro. Water Dist. of S. Calif., Tulare Lake Basin Water Storage Dist. & Santa Clara Valley Water District) motion to consolidate appeals 76-1494, 76-1534, 76-1651 & 76-1663 (to "C") —cjb—		
June 22	Rec'd, in 76-1494, 25 Joint Intervenors-Aplts' Briefs (6/21/76) —dmf—		
June 29	Filed, in 76-1981, order (C) granting federal aplts leave to file typewritten copy of brief pending reproduction —dmf—		
Jun 29	Filed, in 76-1494, order (C) consolidating 76-1494, 76-1534, 76-1651 and 76-1663 for purposes of briefing and argument. Subject to reconsideration if any objection filed within 7 days —dmf—		
Jun 29	Filed, in 76-1494, 25 Intervenors-Aplts' Briefs (6/21/76) —dmf—		
Jun 29	Filed, in 76-1494, one typewritten Federal Aplts' Brief —dmf—		
July 6	Filed Appellees Memorandum (Sierra Club, et al) in opposition to Motion requesting judicial notice. 7/2 to Schickele —ec—		
Jul 7	Rec'd, in 76-1981 as of July 2, 1976, 25 Federal Aplts' Briefs; (6/24/76) cover incorrect —dmf—		
Jul 12	Filed Reply Memorandum of Intervenor-Appellants (Metropolitan Water District of So. Calif., et al) in support of motion requesting judicial notice. to Schickele —ec—		
Jul 19	Filed motion & order (Clk) granting aples motion for ext of time. Aples Sierra Club, Friends of the Earth, H. Schramm & W. Dixon may have to Aug. 20, 1976, in which to file briefs. Subj to reconsideration if any obj filed w/in 7 days —ec—		
Jul 21	Rec'd supplemental affidavit in support of motion for ext of time for filing aples' briefs. (Motion already acted upon) —cjb—		
Jul 22	Filed, in 76-1981, 25 Aplts' Briefs (6/24/76) —dmf—		
Aug 17	Filed motion & order (C.D. Clk) extending aples' time (Dixon, et al) for filing brief to Sept 20, 1976. Subj to reconsideration if any obj filed w/in 7 days. —ec—		
Aug 30	Filed order (H & G) Upon due consideration, the motion of Intervenor-aplt's (Kern County, Tulare Basin Water, Storage, etc.,) requesting judicial notice is denied. —fn—		
Sep 20	Filed 25 Aplees' Briefs (Dixon, et al) 9/20/76 —dmf—		

Same record for 76-1494, 76-1534, 76-1651, 76-1663, 76-1981

Date	Filings-Proceedings	Clerk's Fee Appellant	Clerk's Fee Appellee
Oct 7	Filed motion & order (Clk) granting ext of time for filing aplts' closing briefs to Nov 20, 1976. Subj to reconsideration if any obj filed w/in 7 days. (aplts Livermore, et al) —wx—		
Oct 8	Filed in 76-1981, aplt's (USA) motion for permission to file typewritten copy of brief pending repro. Schickele —ec—		
October 19	Filed Aples' (Sierra Club, et al) motion for leave to file errata to brief of Plaintiffs-Aples filed 9/20/76. Schickele —pb—		
Oct 19	Filed order (A) Upon due consideration, the motion of (USA) for permission to file a typewritten copy of the brief pending reproduction is granted. —fn—		
Oct 28	Filed, 76-1981, 25 Aplts' Reply Briefs (USA) 10/15/76 —dmf—		
Nov 3	Filed order (H) upon due consideration, the aple's motion for leave to file errata to their brief is granted —fn—		
Nov 19	Filed 25 Aplts' Reply Briefs (Livermore, et al) 11/18/76 —dmf—		
Nov 22	Filed 25 Intervenor-Aplts' Reply Briefs (Kern County Water Agency, et al) 11/22/76 —dmf—		
1978			
Apr 12	Filed in 76-1981, as of April 3, motion (Sec. of the Interior) SF to accelerate oral argument. (panel) 3/39/78 —dmf—		
May 9	Argued & submitted to Ely, Trask, Tang, CJJ —ec—		
Jul 24	Recvd as of 7/21, from Michael R. Sherwood, Esq., letter dtd. 7/19/78, re add'l citation. (panel) —ec—		
Jul 31	Recvd in 76-1494, from Victor E. Gleason, Esq., letter dated Jul 28, 1978, re Supreme Court's decision in California v. U.S. (panel) —ec—		
Nov 30	As of 11/22/78, Aple's add'l citations. (panel) —vt—		
1979			
Oct. 31	ORDERED OPINION (ELY) TANG CONCURRING FILED & JUDG TO BE FILED & ENTD.		
Oct. 31	Filed opinion—Affirmed in part, reversed in part, and remanded for further proceedings		
Oct. 31	Filed & Entered Judgment. —rmc—		
Nov. 19	Filed, as of Nov. 14, motion & order (clrk) granting aples' (SIERRA CLUB, et al) an ext. of time to and including Nov. 21, 1979 to file petition for rehearing and suggestion for rehearing en banc. —db—		
Nov. 23	Filed as of Nov. 21, aples' (SIERRA CLUB, et al) petition for rehearing and suggestion for rehearing en banc. (panel, active judges) 11/21 —db—		
1980			
Jan. 9	Rec'd as of Jan. 8, ltr dtd Jan. 7, from George Deukmejian's office re: requesting Court to act upon petition for rehearing. (panel) —db—		

Date	Same record for 76-1494, 76-1534, 76-1651, 76-1663, 76-1981 Filings-Proceedings	Clerk's Fee Appellant	 Appellee
Jan. 17	Filed order (E, T & Tg) the petition for Rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED. —rmc—		
	Mandate Issued		
Feb. 15	Filed, as of Feb. 13, aplt's (STATE OF CALIF) motion to recall and stay mandate. (panel) 2/13 —db—		
Feb. 19	Received SC notice of filing petition for cert on 2/13/80, (California) SC#79-1252. —pn—		
Feb. 25	Filed order (WE) the mandate issued to the DC herein on Jan. 28, 1980 is recalled and stayed pending determination by the Supreme Ct of the application for a writ of certiorari filed by the State of CA. —rmc—		
Apr. 3	Received SC notice of filing petition for cert (Kern County Water) on 3/27/80 SC#79-1502. —pn—		
Oct. 14	Filed certified copy of SC order granting certiorari on 10/6/80, SC#79-1252 & 1502. (copies to panel) —pn—		

AMENDED COMPLAINT

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

[Case caption omitted]

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs allege the following:

Jurisdiction

1. This action arises under the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 400 et seq.; the National Environmental Policy Act of 1969, 83 Stat. 852, the Fish and Wildlife

Coordination Act, as amended, 16 U.S.C. §§ 661-666; the National Estuarine Areas Act, 16 U.S.C. §§ 1221 et seq.; and the Federal Water Pollution Control Act, as amended, 33 U.S.C. §§ 1151 et seq.; Jurisdiction of this Court is conferred by the Federal Question Statute, 28 U.S.C. § 1331(a), the 1962 Mandamus Act, 28 U.S.C. § 1361, the Declaratory Judgments Act, 28 U.S.C. § 2201, and Section 10 of the Administrative Procedure Act, 5 U.S.C. 701-706. The matter in controversy exceeds $10,000.00 exclusive of interest and costs. As to the state claim asserted herein, the court has pendant jurisdiction thereof.

Parties

2. Plaintiff SIERRA CLUB is a non-profit California corporation and from 1892 to the present has maintained its principal office in San Francisco, California. The SIERRA CLUB has approximately 130,000 members of whom approximately 40,000 live in the area of San Francisco Bay and the Delta formed by the Sacramento and San Joaquin Rivers. The SIERRA CLUB is dedicated to the preservation and conservation of the natural resources, fish and wildlife of the United States including its rivers, bays, wetlands, deltas and estuarine areas. The SIERRA CLUB has regularly served as a responsible representative of persons similarly interested. Included in the membership of the SIERRA CLUB are many persons who use the waters referred to herein for recreational purposes, including but not limited to boating, fishing and swimming. The SIERRA CLUB brings this action in behalf of said members, as well as in its own behalf, and will adequately represent the interests of such persons. One of the purposes of the SIERRA CLUB is to represent persons interested in the protection and preservation of natural resources and the environment by such means, among others, as the commencement of legal action when the SIERRA CLUB believes such action is necessary or appropriate. The SIERRA CLUB and its members are adversely affected and aggrieved by the acts complained of herein.

3. Plaintiff FRIENDS OF THE EARTH (hereinafter FOE) is a non-profit corporation organized and operating under the laws

of the State of New York, with a principal place of business in San Francisco, California. FOE, by its activities and its conduct is committed to the preservation, restoration and rational use of the environment, especially in the restoration of those portions of the earth which have been mistreated by man, and in the preservation of remaining wilderness areas. FOE has regularly served as a responsible representative and spokesman of persons similarly interested in litigation and administrative and legislative proceedings affecting the environment. FOE brings this action on behalf of its members and in its own behalf and will adequately represent the interests of such persons. FOE's interest and the interests of its members are adversely affected and are directly aggrieved by those acts of defendants as hereinafter more fully appears, including the loss of recreational activities and esthetic enjoyment.

4. Plaintiff HANK SCHRAMM is and has been for the past 10 years engaged in the business of commercial fishing and the operation of sports-fishing party boats in the waters of San Francisco Bay and of the Pacific Ocean in the region of San Francisco. HANK SCHRAMM has an economic interest in and depends for his livelihood on the maintenance, preservation and conservation of sports and commercial fisheries in San Francisco Bay and in the adjoining waters of the Pacific Ocean and would be adversely affected by the diversions of water from the discharge of polluted water into the Sacramento River and Delta and by other acts of defendants complained of here.

5. Plaintiff WILLIAM DIXON is a lifelong resident of California and the San Francisco Bay area. DIXON owns substantial property in the Sacramento-San Joaquin Delta region, to wit, partnership in the St. Germain Duck Club on Grizzly Island. The diversion of water and pollution of San Francisco Bay by the acts of the defendants as hereinafter more fully appears, directly and substantially affect the economic value of his property interests and are detrimental to the recreational and esthetic enjoyment of his property.

6. Defendant ROGERS C. B. MORTON is the Secretary of the Interior of the United States and is responsible for the administration of the United States Department of the Interior.

7. Defendant GILBERT G. STAMM is the Acting Commissioner of the Bureau of Reclamation of the United States Department of the Interior.

8. Defendant HOWARD H. CALLAWAY is the Secretary of the Army of the United States.

9. Defendant WILLIAM C. GRIBBLE, JR. is the Chief of Engineers of the United States Army and the Administrator of the United States Army Corps of Engineers.

10. Defendant GEORGE B. FINK is the Division Engineer of the South Pacific Division of the United States Army Corps of Engineers and maintains his office in the City and County of San Francisco, State of California. Included within the geographic boundaries of the South Pacific Division of the Corps of Engineers are the Sacramento River, the Sacramento-San Joaquin Delta, San Francisco Bay and adjoining waters of the Pacific Ocean. BRIG. GEN. FINK is responsible for the issuance of permits granting the approval of Chief of Engineers and Secretary of the Army with respect to structures affecting navigable waters of the United States within the geographic boundaries of said South Pacific Division.

11. Defendant NORMAN B. LIVERMORE, JR. is the Secretary for Resources of the State of California in which capacity he supervises and administers the operations of the Resources Agency of the State of California.

12. Defendant JOHN R. TERRINK is the Director of the Department of Water Resources, which is a department within the Resources Agency of the State of California.

GENERAL ALLEGATIONS

13. Plaintiffs seek declaratory relief adjudicating and decreeing that existing and proposed diversions of water from the Sacramento and San Joaquin Rivers and their tributaries

and the depositing of waste water therein by the State of California and the United States Bureau of Reclamation, as more particularly described below, cannot proceed until the defendants have complied with the laws and statutes of the United States and the State of California respecting conservation of fish, wild life and other natural resources, protection of water quality and the construction of facilities affecting navigable waters of the United States. Plaintiffs further seek injunctive relief enjoining said diversions of water until such time as the studies and determinations required by law have been made and the approvals required by law have been obtained.

14. The purpose of this action is to preserve and protect the quality of water and the fish and wild life habitat in the Sacramento and San Joaquin Rivers, the Sacramento-San Joaquin Delta, and San Francisco Bay, including Suisun and San Pablo Bays, and to prevent permanent and irreparable damage to fisheries, public health and recreation which would be caused by excessive diversion of water from the Sacramento and San Joaquin Rivers.

15. The Sacramento and San Joaquin Rivers combine to drain the Central Valley of California, which comprises about 37% of the total land area of the State of California.

16. The Sacramento-San Joaquin Delta ("Delta") contains approximately 700 miles of navigable meandering waterways which provide a unique environment for a variety of fish and other aquatic life. Approximately 25% of California warm water and anadramous sport fishing and 80% of the commercial salmon fishing of California are dependent upon the Delta environment.

17. The Delta and the marshes and wetlands adjoining the Delta and downstream waters are a wintering area and a vital natural habitat for migratory birds on the Pacific Flyway.

18. San Francisco Bay constitutes one of the major and most important estuaries in the United States. More than four million people reside in the metropolitan Bay Area and use and

depend in one way or another upon the water in San Francisco Bay for recreation, commerce or esthetic enjoyment. These uses are contingent upon the water quality of San Francisco Bay, which is critically dependent upon continued discharge of fresh water from the Delta to provide flushing and circulation necessary to reduce salinity content, phosphate concentration and pollution of the waters of San Francisco Bay.

19. As more particularly alleged hereinbelow, the Secretary of the Interior of the United States is charged with the responsibility for preserving, conserving and protecting the fish, wild life and other natural resources of the United States. The Secretary of the Interior has failed to discharge this responsibility and has instead permitted the Bureau of Reclamation to promote and commence the construction of facilities, described in paragraphs 21 through 32, which would have the combined effects (1) of diverting from the Sacramento River much of the water which otherwise would flow from it into San Francisco Bay and (2) of causing substantial pollution of the Delta and San Francisco Bay by causing water drained from the San Joaquin Valley which has been polluted by pesticides and other poisonous wastes to be deposited directly into the Delta.

State Water Project

20. In 1959, the Legislature of the State of California adopted the Burns-Porter Act which authorized the construction of the "State Water Project", which project would consist of a system of dams, canals, pumping plants and other facilities designed to divert water in excess of four million acre-feet per year from Northern California to other parts of the State of California, primarily Southern California. The Burns-Porter Act was submitted to and approved by the voters of the State of California on November 8, 1960. The State Water Project was designed to utilize existing federal facilities, is financed in large part by federal funds, and is designed to operate in coordination with the Central Valley Project of the United States Bureau of Reclamation. Some of the essential facilities of the State

Water Project are "joint use facilities" which also constitute integral parts of the Central Valley Project of the United States Bureau of Reclamation.

21. The State of California, through its Resources Agency and Department of Water Resources, has entered into contracts pursuant to which it has agreed to use its best efforts to deliver 4.23 million acre feet of water annually. The primary purchasers of water are the Kern County Water Agency, which has agreed to purchase 1,153,000 acre-feet annually, and the Metropolitan Water District of Southern California, which has entered into contracts for 2,001,500 acre-feet per year.

Delta Pumping Plant

22. The State Water Project provides for obtaining substantially all of the 4.23 million acre-feet of water required annually by said project from the Sacramento River and its tributaries. Among the facilities completed or partially constructed for this purpose are the Oroville Dam on the Feather River and the Delta Pumping Plant, which is located in the Sacramento River Delta. The purpose of the Delta Pumping Plant is to divert approximately four million acre-feet of water per year from the Sacramento River to be transported by means of canals, pumping plants and other facilities to other areas in California, primarily Southern California. The Delta Pumping Plant has been financed in part with money contributed by the federal government and has been and is being constructed with the assistance of and in cooperation with the United States Bureau of Reclamation.

23. The Delta Pumping Plant is located on a body of water known as Clifton Court Forebay, essentially a holding area for water to be pumped through the plant directly into the California Aqueduct, and was created by the California Department of Water Resources and the Bureau of Reclamation by excavating and building dikes around the periphery of an area of land within the Delta known as the Clifton Court Tract.

Central Valley Project

24. The United States Bureau of Reclamation has sponsored and administered the construction and operation of the Central Valley Project, which consists of a series of reservoirs, pumping plants, canals and other facilities for the purpose of controlling the flow of water in the Sacramento River, generating hydro-electric power and providing water for irrigation and other uses in the Central Valley of California.

Tracy Pumping Plant

25. Included in the facilities of the Central Valley Project is the Tracy Pumping Plant, located on an inlet channel of Old River in the Delta. The purpose of the Tracy Plant is to divert water from the Delta by means of pumping into the 115 mile long Delta-Mendota Canal, which leads to various locations in the Central Valley of California.

26. The Bureau of Reclamation presently is diverting approximately 1,500,000 acre-feet of water annually from the Sacramento and San Joaquin Rivers by means of the Tracy Pumping Plant and the Delta-Mendota Canal.

Peripheral Canal

27. The State of California and Bureau of Reclamation propose jointly to finance, construct and operate a canal approximately 43 miles in length from a point on the Sacramento River near Hood, California, to a point in the Sacramento River Delta adjacent to the Tracy Pumping Plant and the Delta Pumping Plant. This canal is known as and is referred to herein as the "Peripheral Canal". The State of California and Bureau of Reclamation propose that the Peripheral Canal be generally 400 feet wide and 30 feet deep.

28. The proposed purpose and function of the Peripheral Canal is to transport fresh water to the Delta and Tracy Pumping Plants from a point on the Sacramento River up-

stream from both the point of salt water intrusion and the point where the polluted waters of the San Joaquin River join the Sacramento River and thereby to ensure that saline and polluted water in the Delta does not enter the pumps of the Tracy Pumping Plant or the Delta Pumping Plant.

29. The State of California and Bureau of Reclamation have expended public funds in the millions of dollars for the engineering design of the Peripheral Canal and have commenced excavation or propose to commence excavation for the Peripheral Canal in the near future. The State of California has approved and authorized the construction of the Peripheral Canal and the Department of the Interior has submitted to Congress a recommendation that the federal government participate in the financing and construction thereof. The State of California, through its Resources Agency and Department of Water Resources has publicized its position that it will proceed with construction of the Peripheral Canal regardless whether federal participation is authorized. The Task Force appointed to recommend an Environmental Protection Agency position on water quality in the Delta has submitted a preliminary report concluding that the Peripheral Canal, as now contemplated, should not be constructed.

East Side Canal

30. The Bureau of Reclamation further proposes to divert an additional 2,500,000 acre-feet of water annually from the Sacramento and San Joaquin Rivers and their tributaries by means of a proposed canal, to be known as the East Side Canal, reservoirs, pumping plants and other related facilities, all of which are referred to collectively herein as the East Side Canal, the construction of which has commenced or is about to commence.

San Luis Drain

31. The Bureau of Reclamation has commenced the construction of a facility known as the "San Luis Drain" for the purpose of collecting water drained from agricultural lands and

other wastes in the San Joaquin Valley and transmitting this water to the Delta where it will be deposited to flow thence into San Francisco Bay. The water deposited by this means in the Delta and San Francisco Bay will be so polluted with pesticides, herbicides and other wastes as to be unfit even for irrigation. The San Luis Drain will consist primarily of a canal 188 miles in length and related facilities for the collection of waste waters and the depositing of such waters into the Delta.

Effects of Diversion of Water from The Sacramento and San Joaquin Rivers

32. The proposed diversions of water from the Sacramento and San Joaquin Rivers by means of the Peripheral Canal, Delta Pumping Plant, Tracy Pumping Plant and East Side Canal will substantially reduce the flow of water in the Sacramento River and from the Sacramento River into San Francisco Bay. At the present time, the operation of the Tracy Pumping Plant and the partially competed Delta Pumping Plant causes a reversal of the direction of flow in the Delta thereby causing salt water in the lower reaches of the Delta to intrude further upstream than such intrusion otherwise would reach and adversely affecting agricultural property in the Delta region and recreational and esthetic enjoyment of the Delta.

33. The resulting reduction in the flow of water into San Francisco Bay will delay and reduce the flusing of wastes and pollution from San Francisco Bay and thereby cause and result in an increase in the pollution of San Francisco Bay Waters.

34. The diversions of water referred to herein will alter the currents, water levels and volumes of water flow in the Sacramento River, the San Joaquin River and the Sacramento-San Joaquin Delta and thereby directly affect navigation in said waters and the operation in said waters of pleasure boats, ships and other vessels.

35. The diversion of water proposed by the State of California and Bureau of Reclamation will increase the salinity of the Sacramento River and Delta and will thereby alter and adversely affect marine life and the habitat of migratory birds in said waters and in wetlands, marshes and other adjacent areas.

36. The diversions of water from the Sacramento River and its tributaries commenced and contemplated by defendants will, unless restrained, cause substantial and irreparable injury to marine life, plant and animal life, wild fowl and recreation in the Sacramento River, the Delta, San Joaquin River, San Francisco Bay and adjoining waters of the Pacific Ocean and would cause a substantial increase in the pollution of all of said waters.

37. The acts of defendants complained of herein, the construction and operation of the Peripheral Canal, Delta Pumping Plant, Tracy Pumping Plant, East Side Canal and San Luis Drain, the diversion of water proposed by the defendants and the dumping of agricultural and industrial wastes into the Delta by means of the San Luis Drain as proposed by defendants will cause substantial and irreparable injury to the plaintiffs and to millions of people who reside in the area of the waters referred to herein and who use said waters for recreation and esthetic enjoyment, many of whom are members of plaintiffs Sierra Club and Friends of the Earth and look to said organizations to protect their interest in the preservation and conservation of those waters and the fish, wild life and other marine life which have their habitat in and around those waters.

FIRST CLAIM FOR RELIEF

The Rivers and Harbors Act of 1899

38. Plaintiffs refer to and by this reference incorporate herein paragraphs 1 through 38 of the complaint.

39. The construction, commencement of construction, or operation of the Peripheral Canal, the Delta Pumping Plant, the San Luis Drain, the East Side Canal or the Tracy Pumping Plant is, or would be, unlawful until such time as the locations and plans of said facilities are submitted to and approved by Congress, the Chief of Engineers of the United States Army Corps of Engineers and the Secretary of the Army pursuant to Section 9 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 401, which section states:

> It shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in any port roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of the Army: *Provided,* that such structure may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of the Army before construction is commenced: *And provided further,* that when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of the Army, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and recieved the approval of the Chief of Engineers and of the Secretary of the Army.

40. The Sacramento River, the Sacramento-San Joaquin Delta, the San Joaquin River and San Francisco Bay constitute navigable waters within the meaning of the River and Harbors Act of 1899.

41. Neither the locations nor the plans of the Peripheral Canal, East Side Canal, San Luis Drain, Tracy Pumping Plant or Delta Pumping Plant have been submitted to or approved by Congress, the Chief of Engineers of the United States Army Corps of Engineers or by the Secretary of the Army.

42. The construction of the Peripheral Canal, East Side Canal, San Luis Drain, Tracy Pumping Plant or Delta Pumping Plant would each constitute or require the construction of a bridge, dam, dike, or causeway over or in a port, roadstead, haven, harbor, canal, navigable river or other navigable water of the United States. Specifically, each of said facilities requires the construction of openings in dikes adjoining the Sacramento River or the Delta to permit the inflow of water, in the case of the East Side Canal, the Peripheral Canal, Tracy Pumping Plant and Delta Pumping Plant, or the outflow of water in the case of the San Luis Drain. The operation of each of said facilities would cause or result in the diversion of water from or the discharge of water into navigable water of the United States which diversion and discharge are unlawful in the absence of the approval of Congress, the Secretary of the Army and Chief of Engineers required by the Rivers and Harbors Act of 1899 as aforesaid.

43. The building or commencement of the building of or the operation of the Peripheral Canal, East Side Canal, San Luis Drain, Delta Pumping Plant or Tracy Pumping Plant is further made unlawful by Section 10 of the Rivers and Harbors Act of 1899, 33 U.S.C.A. § 403, which section provides as follows:

> "The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited;

and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, harbor of refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same."

44. The construction of the Peripheral Canal, Delta Pumping Plant, San Luis Drain, East Side Canal, or Tracy Pumping Plant would each require or constitute the creation of an obstruction to the navigable capacity of the waters of the United States, to wit, the waters of the Sacramento River, the Sacramento-San Joaquin Delta, the San Joaquin River, and San Francisco Bay, and therefore would be or is in substantial violation of the provisions of Section 403 of the Rivers and Harbors Act of 1899 and is in excess of the statutory powers and authority of defendants to the detriment and irreparable harm of plaintiffs.

45. The building or commencement of the building of the Peripheral Canal, Delta Pumping Plant, East Side Canal, San Luis Drain, or Tracy Pumping Plant would each require or constitute the building or commencement of the building of a wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty or other structure in a port, roadstead, haven, harbor, canal, navigable river, or other water of the United States and is or would be unlawful pursuant to Section 403 of the Rivers and

Harbors Act of 1899 unless and until such time as the plans thereof have been affirmatively authorized by Congress, recommended by the Chief of Engineers of the United States Army Corps of Engineers and authorized by the Secretary of the Army.

46. The construction or operation of the Peripheral Canal, Delta Pumping Plant, San Luis Drain, East Side Canal and Tracy Pumping Plant would or did each have the effect of altering or modifying the course, location, condition and capacity of the channels of navigable waters of the United States, to wit, the Sacramento River, the Delta, the San Joaquin River and San Francisco Bay, and is therefore unlawful pursuant to Section 403 of the Rivers and Harbors Act of 1899 because such work has not been affirmatively authorized by Congress, recommended by the Chief of Engineers of the United States Army Corps of Engineers and authorized by the Secretary of the Army. Specifically, each of said facilities, by diverting water from or discharging water into said navigable waters, or waters of the United States, would alter or modify the direction, quantity and rate of flow of said navigable waters. The continuing and substantial destructive alteration of the Delta and San Francisco Bay environment resulting from the operation of said failities by the State of California and Bureau of Reclamation is in violation of their statutory jurisdiction and authority and is detrimental to the rights and interests of the plaintiffs. The operation of the Tracy Pumping Plant and Delta Pumping Plant has, prior to the commencement of this action, caused reversals of the normal direction of the flow in said navigable waters and has reduced the level of said water below normal and customary levels, which reversals of flow and reduction in water levels has caused direct damage to fish and wild life and the recreational capacity of the Delta region. The Peripheral Canal would itself constitute a substantial alteration and modification of the navigable waters of the Sacramento River.

47. Congress has not approved the diversions of water from and discharge of water into navigable waters of the United States, the alteration and modification of the course, location, condition and capacity of said waters, or the obstruction to the navigable capacity of said waters, which would be caused by or result from the construction or operation of the Peripheral Canal, Tracy Pumping Plant, Delta Pumping Plant, San Luis Drain or East Side Canal.

48. The Chief of Engineers has not recommended and the Secretary of the Army has not approved the diversions of water from and discharge of water into navigable waters of the United States, the alteration and modification of the course, location, condition and capacity of said waters, or the obstructions to the navigable capacity of said waters which would be caused by or result from the construction or operation of the Peripheral Canal, Tracy Pumping Plant, Delta Pumping Plant, San Luis Drain or East Side Canal or the plans therefor.

SECOND CLAIM FOR RELIEF

49. Plaintiffs refer to and by this reference incorporate herein paragraphs 1 through 48 of the complaint.

50. Section 13 of the Rivers and Harbors Act of 1899, 33 U.S.C.A. § 407, frequently referred to as the "Refuse Act", provides as follows:

> "It shall not be lawful to throw, discharge, or deposit, or cause, suffer or procure to be thrown, discharged, or deposited either from or out of any ship, barge or other floating craft of any kind, or from the shore, wharf, manufacturing establishment or mill of any kind, any refuse matter of any kind or description whatever other than that flowing from streets and sewers and passing therefrom in a liquid state, into any navigable water of the United States or into any tributary of any navigable water from which the

same shall float or be washed into such navigable water; and it shall not be lawful to deposit or cause, suffer or procure to be deposited material of any kind in any place on the bank of any navigable water, or on the bank of any tributary or any navigable water, where the same shall be liable to be washed into such navigable water, either by ordinary or high tides, or by storms or floods or otherwise, whereby navigation shall or may be impeded or obstructed: *Provided* that nothing herein contained shall extend to, apply to or prohibit the operations in connection with the improvement of navigable waters or construction of public works, considered necessary and proper by the United States officers supervising such improvement or public works: *And provided further* that the Secretary of the Army, whenever in the judgment of the Chief of Engineers anchorage and navigation will not be injured thereby, may permit the deposit of any material above mentioned in navigable waters, within limits to be defined and under conditions to be prescribed by him, provided application is made to him prior to depositing such material; and whenever any permit is so granted the conditions thereof shall be strictly complied with, and any violation thereof shall be unlawful."

51. The construction and operation of the San Luis Drain will result in the discharge into navigable waters of the United States of polluted water, pesticides, herbicides and agricultural and other wastes in violation of said Section 13 of the Rivers and Harbors Act of 1899, and is in substantial violation of the statutory jurisdiction and authority of the Bureau of Reclamation, defendants ROGERS C. B. MORTON and GILBERT G. STAMM and the other defendants herein and is detrimental to the rights and interests of plaintiffs.

THIRD CLAIM FOR RELIEF

Fish and Wildlife Coordination Act

52. Plaintiffs refer to and by this reference incorporate herein paragraphs 1 through 51 of the complaint.

53. The impounding or diversion of the waters of the Sacramento or San Joaquin Rivers by means of the Tracy Pumping Plant, Delta Pumping Plant, East Side Canal or Peripheral Canal is made unlawful by the Fish and Wildlife Coordination Act, 16 U.S.C.A. §§ 661-666c, specifically Section 2 thereof, 16 U.S.C.A. § 662, which prohibits such impounding or diversion by any department or agency of the United States or by any public or private agency unless such department or agency shall have first consulted with the United States Fish and Wildlife Service, Department of the Interior, with a view to the conservation of wildlife resources by preventing loss of and damage to such resources.

54. The construction or operation of the Tracy Pumping Plant, Delta Pumping Plant, East Side Canal or Peripheral Canal will each constitute or result in the impounding or diversion of waters of the Sacramento or San Joaquin Rivers. Specifically, by means of said facilities, defendants propose to impound and divert in excess of seven million acre feet of water per year from said rivers and their tributaries.

55. Neither the State of California nor the Bureau of Reclamation has consulted with the United States Fish and Wildlife Service, Department of the Interior, with a view to the conservation of wildlife resources of preventing loss of and damage to such resources in the manner required by the Fish and Wildlife Coordination Act.

56. The Fish and Wildlife Coordination Act further provides in Section 2(b) thereof, 16 U.S.C.A. § 662(b), that the reports and recommendations of the Secretary of the Interior on the wildlife aspects of such projects and any report of the head of the State agency exercising administration over

the wildlife resources of the State, based on surveys and investigations conducted by the United States Fish and Wildlife Service and such State agency for the purpose of determining the possible damage to wildlife resources and for the purpose of determining means and measures that should be adopted to prevent the loss of, or damage to such wildlife resources, shall be made an integral part of any report prepared or submitted by any agency of the Federal Government responsible for engineering surveys and construction of such projects when such reports are presented to Congress or to any agency or person having the authority or the power, by administrative action or otherwise, (1) to authorize the construction of water-resource development projects or (2) to approve a report on the modification or supplementation of plans for previously authorized projects. Said section further provides that the recommendations of the Secretary of the Interior shall be as specific as is practicable and shall describe the damage to wildlife attributable to the project and the measures proposed for mitigating or compensating for these damages.

57. The Secretary of the Interior has made no report or recommendation pursuant to and in the manner required by said Section 2(b) of the Fish and Wildlife Coordination Act, and no such report has been made a part of any report prepared or submitted to the Congress, the Secretary of the Army, the Corps of Engineers of the United States Army or any other agency of the Federal Government as required by said Section 2(b).

58. The Fish and Wildlife Coordination Act further provides, in Section 2(b) thereof, that the project plan for any diversion or impounding of waters shall include "such justifiable means and measures for wildlife purposes as the reporting agency finds should be adopted to obtain maximum overall project benefits."

59. The project plans of the Peripheral Canal, Delta Pumping Plant, East Side Canal, San Luis Drain and Tracy Pumping Plan in no instance include such justifiable means and measures for wildlife purposes as are required by said Section 2(b) of the Fish and Wildlife Coordination Act and no studies or reports have been made by any agency of the California state government or of the federal government sufficient to permit a determination to be made of the means and measures necessary to prevent loss of or damage to wildlife resources as the result of the construction or operation of said facilities.

60. The existing and proposed impounding and diversion of the waters of the Sacramento and San Joaquin Rivers is further made unlawful by Section 3 of the Fish and Wildlife Coordination Act, 16 U.S.C.A. § 663, by reason of the failure of the State of California and the Department of the Interior to make adequate provisions for the use of said facilities for the conservation, maintenance and management of wildlife resources as required by said Section 3 of the Fish and Wildlife Coordination Act, subsection (a) of which provides:

> "Subject to the exceptions prescribed in section 662(h) of this title, whenever the waters of any stream or other body of water are impounded, diverted, the channel deepened, or the stream or other body of water otherwise controlled or modified for any purpose whatever, including navigation and drainage, by any department or agency of the United States, adequate provision, consistent with the primary purposes of such impoundment, diversion or other control, shall be made for the use thereof, together with any areas of land, water, or interests therein, acquired or administered by a Federal agency in connection therewith, for the conservation, maintenance and management of wildlife resources thereof, and its habitat thereon, including the development and improvement of such wildlife resources pursuant to the provisions of section 662 of this title."

61. The State of California and the Department of the Interior have not made adequate provisions for the use of the Peripheral Canal, East Side Canal, San Luis Drain, Delta Pumping Plant and Tracy Pumping Plant for the conservation, maintenance and management of wildlife resources affected by said facilities in the manner required by said Section 3 of the Fish and Wildlife Coordination Act.

62. For the reasons set forth in paragraphs 53 through 62 above, the construction, commencement of construction, operation or continued operation of the Peripheral Canal, East Side Canal, San Luis Drain, Delta Pumping Plant or Tracy Pumping Plant is and will be unlawful until such time as the defendants (1) have consulted with the United States Fish and Wildlife Service, Department of the Interior in the manner required by the Fish and Wildlife Coordination Act, (2) have presented to the Congress reports and recommendations of the Secretary of the Interior on the wildlife aspects of said facilities including (a) a report of the head of the agency of the State of California exercising administration over the wildlife resources of the State of California and (b) a specific description of "such justifiable means and measures for wildlife purposes" as should be adopted to achieve compliance with the national policies set forth in and the requirements of the Fish and Wildlife Coordination Act, and (3) have made adequate provision for the conservation, maintenance and management of wildlife resources of the Sacramento and San Joaquin Rivers, the Delta, San Francisco Bay and the adjoining waters of the Pacific Ocean. The continuing construction or operation of said facilities or approval thereof by the defendants and each of them is in violation of their statutory jurisdiction and authority and is detrimental to the rights and interests of plaintiffs.

FOURTH CLAIM FOR RELIEF

National Environmental Policy Act of 1969

63. Plaintiffs refer to and by this reference incorporate herein paragraphs 1 through 62 of the complaint.

64. The National Environmental Policy Act of 1969 ("NEPA") Public Law 91-190, 83 Stat. 852, specifically Section 101 thereof, declares a national policy of encouraging productive and enjoyable harmony between man and his environment, to promote efforts which will prevent or eliminate damage to the environment and biosphere and stimulate the health and welfare of man, and to enrich the understanding of the ecological systems and natural resources important to the Nation.

65. Section 101 of NEPA further provides that it is the responsibility of the Federal Government to use all practicable means, consistent with other essential considerations of national policy, to improve and coordinate Federal plans, functions, programs and resources to the end that the Nation may

> (1) fulfill the responsibilities of each generation as trustee of the environment for succeeding generations;
>
> (2) assure for all Americans safe, healthful productive and esthetically and culturally pleasing surroundings;
>
> (3) attain the widest range of beneficial uses of the environment without degradation, risk to health or safety, or other undesirable and unintended consequences;
>
> (4) preserve important, historic, cultural and natural aspects of our national heritage, and maintain, wherever possible an environment which supports diversity and variety of individual choice;
>
> (5) achieve a balance between population and resource use which will permit high standards of living and a wide sharing of life's amenities; and
>
> (6) enhance the quality of renewable resources and approach the maximum attainable recycling of depletable resources.

66. Section 102 of NEPA provides that to the fullest extent possible the policies, regulations and public laws of the United

States shall be interpreted and administered in accordance with the policies set forth in NEPA and that all agencies of the federal government shall:

> (a) utilize a systematic, interdisciplinary approach which will insure the integrated use of the natural and social sciences and the environmental design arts in planning and in decision-making which may have an impact on man's environment;
>
> (b) identify and develop methods and procedures, in consultation with the Council of Environmental Quality established by title II of this Act, which will insure that presently unquantified environmental amenities and values may be given appropriate consideration in decision making along with economic and technical considerations;
>
> (c) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on
>
> > (i) the environmental impact of the proposed action,
> >
> > (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
> >
> > (iii) alternatives to the proposed action,
> >
> > (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
> >
> > (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.

67. The environmental impact statement prepared for the San Luis Drain is inadequate and does not meet the statutory requirements, in that it fails to describe in detail the

environmental impact, adverse environmental effects, long-term and short-term balance of use and productivity, irreversible and irretrievable commitments of resources and alternatives to the San Luis Drain. The location and manner of discharge of the San Luis Drain are currently being determined or soon will be determined by the Secretary of the Interior. This determination must be made in accordance with the policies set forth in NEPA, Fish and Wildlife Coordination Act and Estuarine Areas Act and must be preceded by preparation of a statement ["Environmental Impact Statement"] in compliance with Section 102(c) of NEPA, detailing the environmental effects of and the alternatives to further construction of the Drain and the proposed discharges into it.

68. Neither the Corps of Engineers nor the Bureau of Reclamation has prepared a detailed statement as required by Section 102(c) of NEPA with respect to water being diverted, at past and present levels, by means of the Tracy Pumping Plant, Delta Pumping Plant, East Side Canal or Peripheral Canal. Said detailed statement must contain information on the above project or proposals with respect to environmental impact, adverse environmental effects, long-term and short-term balance of use and productivity, irreversible and irretrievable commitments of resources and alternatives to those projects or proposals.

69. Neither the Corps of Engineers nor the Bureau of Reclamation has prepared a detailed statement with respect to environmental impact, adverse environmental effects, long-term and short-term balance, irreversible and irretrievable commitments of resources and alternatives to the proposals which would result from diversions of larger quantities of water than are presently being diverted by means of the Tracy Pumping Plant, Delta Pumping Plant, East Side Canal or Peripheral Canal. Additionally, no statement has been prepared advising Congress of the environmental effects which would result from congressional authorization of different levels of diversion.

70. The existing and proposed diversions of water from the Sacramento and San Joaquin Rivers by means of the Peripheral Canal, Delta Pumping Plant, Tracy Pumping Plant and East Side Canal and the discharge of polluted water and wastes in the Delta and San Francisco Bay by means of the San Luis Drain contravene the national policy set forth in NEPA and is in substantial violation of the statutory jurisdiction, authority and power of defendants to the detriment of the rights and interest of plaintiffs.

FIFTH CLAIM FOR RELIEF

71. Plaintiffs refer to and by this reference incorporate herein paragraphs 1 through 70 of the complaint.

Estuarine Areas Act

72. The Estuarine Areas Act, 16 U.S.C. §§ 1221 *et seq.* establishes that it shall be the public policy of the United States and of Congress to protect, conserve and restore the estuaries of the United States.

73. The San Francisco Bay and the Sacramento River Delta are estuaries of the United States.

74. The maintenance of an adequate flow of water at all times in the Sacramento River and from the Sacramento River into San Francisco Bay is essential to the protection, conservation and restoration of San Francisco Bay and the Delta.

75. The diversion of water from the Sacramento River or the San Joaquin River, whether by means of the Peripheral Canal, the Delta Pumping Plant, the East Side Canal, the Tracy Pumping Plant or otherwise, and the deposit of polluted water in the Delta by means of the San Luis Drain, hinders and prevents adequate protection, conservation and restoration of San Francisco Bay and the Delta.

Federal Water Pollution Control Act

76. The Federal Water Pollution Control Act, 62 Stat. 115 (1948), as amended, 33 U.S.C. §§ 1151 *et seq.*, establishes a national policy for the prevention, control and abatement of water pollution and the enhancement of the quality and value of the water resources of the United States.

77. Section 1171(a) of the Federal Water Pollution Control Act provides that "Each Federal agency . . . . having jurisdiction over any real property or facility, or engaged in any Federal public works activity of any kind shall, consistent with the paramount interest of the United States as determined by the President, insure compliance with applicable water quality standards and the purposes of this chapter in the administration of such property, facility or activity."

78. The President of the United States has elaborated on federal policy with regard to water pollution by issuing Executive Order 11507, 35 F.R. 2573 (1970), which states:

> It is the intent of this order that the Federal Government in the design, operation, and maintenance of its facilities shall provide leadership in the nationwide effort to protect and enhance the quality of our air and water resources.

79. The construction or operation of the Peripheral Canal, East Side Canal, San Luis Drain, Delta Pumping Plant, or Tracy Pumping Plant is or would be contrary to the national policy established by the Federal Water Pollution Control Act in that the diversion of water in connection with the construction or operation of any of said facilities would contribute to and cause an increase in the pollution of the Sacramento-San Joaquin Delta and San Francisco Bay.

80. The Secretary of the Interior has violated the policies expressed in the Federal Water Pollution Control Act and Executive Order 11507 and has failed to discharge his duties pursuant thereto in that he has failed to limit or modify the

operation or proposed operation of the facilities of the Central Valley Project so as to comply with the policies and requirements of the Federal Water Pollution Control Act and Executive Order 11507.

Failure of Defendants to Comply with Federal Statutes and National Policies

81. Defendants, WILLIAM C. GRIBBLE, JR., as Chief of Engineers of the Corps of Engineers of the United States Army, HOWARD H. CALLAWAY, as Secretary of the Army, and GEORGE B. FINK, as Division Engineer, are authorized and empowered to enforce compliance with the national policies set forth in the Estuarine Areas Act, the Federal Water Pollution Control Act, the Fish and Wildlife Coordination Act and the National Environmental Policy Act of 1969, with respect to structures and activities which require the approval of the Chief of Engineers pursuant to the Rivers and Harbors Act of 1899.

82. Said defendants cannot authorize, approve or recommend the creation of any obstruction to the navigable capacity of, any alteration or modification of the course, location, condition or capacity of, the diversion of waters from, the discharging of waters into or the impounding of the navigable or other waters of the United States in violation of or without giving due regard to the requirements of and the national policies expressed in the Estuarine Areas Act, the Federal Water Pollution Control Act, the Fish and Wildlife Coordination Act, and the National Environmental Policy Act of 1969.

83. Said defendants cannot authorize, approve or recommend the construction or operation of the Peripheral Canal, Delta Pumping Plant, Tracy Pumping Plant, East Side Canal or San Luis Drain until such time as they have been furnished with the following in compliance with the policies and requirements of the Estuarine Areas Act, the Federal Water Pollution Control Act, the Fish and Wildlife Coordination Act, and the Environmental Policy Act of 1969:

(a) A report of the Secretary of the Interior as required by the Fish and Wildlife Coordination Act, on the wildlife aspects of such projects based on surveys and investigations conducted by the United States Fish and Wildlife Service and the California Department of Fish and Game for the purpose of determining the extent of damage to wildlife resources which would result from such projects;

(b) A report of the Secretary of the Interior, as required by the Fish and Wildlife Coordination Act, on the means and measures which would have to be adopted to prevent the loss of or damage to wildlife resources in the San Joaquin and Sacramento Rivers, the Delta, San Francisco Bay and the adjoining portions of the Pacific Ocean as the result of the construction and operation of said facilities.

(c) A report of the Secretary of the Interior pursuant to the National Environmental Policy Act of 1969 on the environmental impact, the adverse environmental effects, the alternatives to, and the irreversible and irretrievable commitments of resources which would result from the construction and operation of the Peripheral Canal, Delta Pumping Plant, Tracy Pumping Plant, East Side Canal and San Luis Drain.

84. In seeking any approval of Congress of the construction or operation of the Peripheral Canal, Tracy Pumping Plant, Delta Pumping Plant, San Luis Drain or East Side Canal, defendants GILBERT G. STAMM, ROGERS C. B. MORTON, STATE OF CALIFORNIA, NORMAN B. LIVERMORE, JR. and JOHN R. TEERINK are required to submit to Congress the reports of the Secretary of the Interior referred to in the preceding paragraph of this complaint and to disclose to Congress the extent to and manner in which said construction or operation contravenes the policies set forth in and the requirements of the Estuarine Areas Act, the Federal Water Pollution Control Act, the Fish and Wildlife Coordination Act and the Environmental Policy Act of

1960, all of which said defendants have failed to do, as a result whereof the operation, construction or continued construction of said facilities is unlawful.

85. The operation, construction, continued operation or construction or the approval thereof by the defendants and each and all of them is in substantial violation of their statutory responsibilities, powers, jurisdiction and authority to the detriment of the rights and interests of plaintiffs.

SIXTH CLAIM FOR RELIEF

California Environmental Quality Act of 1970

86. Plaintiffs refer to and by this reference incorporate paragraphs 1 through 85 of the complaint.

87. The California Environmental Quality Act of 1970 ("CEQA"), California Public Resources Code Division 10, specifically Chapter 1 thereof, declares a state policy of developing and maintaining a high-quality environment now and in the future, providing the people of California with clean air and water, preventing elimination of fish and wildlife as a result of man's activities, ensuring that long-term protection of the environment be the guiding criterion in public decisions, requiring governmental agencies at all levels to develop standards and procedures necessary to protect environmental quality and requiring governmental agencies to consider qualitative factors as well as economic and technical factors, long-term versus short-term benefits and costs and alternatives to proposed actions affecting the environment.

88. Section 2100 of the California Public Resources Code provides further that it is the state government's responsibility to take immediate steps and to coordinate actions of various state agencies to preserve the health and safety of the people of the state, that each citizen bears a responsibility to contribute to the overall environmental policy and that all agencies which

regulate the activities of people and corporations within the state and public agencies, whose activities affect the quality of the environment, shall, in regulating such activities, give major consideration to the prevention of damages to the environment.

89. In order that the above policy and intent may be properly effectuated Section 21100 of the Public Resources Code provides as follows:

> "All state agencies, boards, and commissions shall prepare, or cause to be prepared by contract, and certify the completion of an environmental impact report on any project they propose to carry out or approve which may have a significant effect on the environment. Such a report shall include a detailed statement setting forth the following:
>
> (a) The environmental impact of the proposed action.
>
> (b) Any adverse environmental effects which cannot be avoided if the proposal is implemented.
>
> (c) Mitigation measures proposed to minimize the impact.
>
> (d) Alternatives to the proposed action.
>
> (e) The relationship between short-term uses of man's environment and the maintenance and enhancement of long-term productivity.
>
> (f) Any irreversible environmental changes which would be involved in the proposed action should it be implemented.
>
> (g) The growth-inducing impact of the proposed action."

90. Section 21101 further provides:

> "In regard to any proposed federal project within this state which may have a significant effect on the

environment and on which the state officially comments, the state officials responsible for such comments shall include in their report a detailed statement setting forth the matters specified in Section 21100 prior to transmitting the comments of the state to the federal government. No report shall be transmitted to the federal government unless it includes such a detailed statement as to the matters specified in Section 21100."

91. Section 21102 provides that no state agency, board or commission shall request funds, nor shall funds be authorized, if the project for which the funds are contemplated falls under the provisions of sections of the Act requiring environmental impact report, if the request for funds is not accompanied by an environmental impact report.

92. The Delta Pumping Plant, Peripheral Canal, East Side Canal, Tracy Pumping Plant and San Luis Drain are projects within the State of California, which have a significant effect on the environment.

93. The Delta Pumping Plant, Peripheral Canal, East Side Canal, Tracy Pumping Plant and San Luis Drain are "Projects" within the meaning of CEQA and therefore subject to its provisions.

94. The existing and proposed diversions of water to and from the Sacramento and San Joaquin Rivers by means of the Delta Pumping Plant, Peripheral Canal, East Side Canal, Tracy Pumping Plant or San Luis Drain are in substantial violation of the statutory jurisdiction, authority and power of the defendants to the detriment of the rights and interests of plaintiffs.

Failure of State Defendants to Comply With State Statutes and Policies

95. Defendants, STATE OF CALIFORNIA, NORMAN B. LIVERMORE, JR., as Secretary for Resources of the State of California and JOHN R. TEERINK, as Director of the Department of Water

Resources for the State of California, are authorized, empowered, and required by law to enforce compliance with the state policies set forth in the California Environmental Quality Act of 1970, with respect to the Delta Pumping Plant, the Peripheral Canal, the East Side Canal, the Tracy Pumping Plant and the San Luis Drain.

96. Said defendants have failed to prepare or cause to have prepared environmental impact reports for the Delta Pumping Plant and Peripheral Canal and are therefore in substantial violation of their statutory authority to the detriment of the rights and interests of plaintiffs.

97. Said defendants have failed to include in any report within the meaning of Section 21101 a detailed statement setting forth the matters specified in Section 21100 of the Public Resources Code, as regards the Tracy Pumping Plant, East Side Canal or San Luis Drain, all as required by Section 21101.

98. By reason of said defendants' failure to prepare or cause to have prepared environmental impact reports on the Delta Pumping Plant or Peripheral Canal and said defendants' failure to comply with the provisions of Section 21101 of the Public Resources Code as regards the Tracy Pumping Plant, East Side Canal or San Luis Drain, the operation or construction or continued operation or construction or any State of California participation in any or all of the projects hereinbefore mentioned is unlawful.

Basis for Declaratory and Injunctive Relief

99. A present controversy exists between plaintiffs and defendants in that defendants propose to proceed with the operation of the Tracy Pumping Plant, the completion and continued operation of the Delta Pumping Plant, and the construction of the Peripheral Canal and East Side Canal and San Luis Drain without obtaining the consent of Congress and the approvals of the Secretary of the Army and Chief of

Engineers which plaintiffs herein claim are required by law and without making due provision for the protection, preservation or conservation of the waters of San Francisco Bay, the Sacramento-San Joaquin Delta, the adjoining waters of the Pacific Ocean, the Sacramento and San Joaquin Rivers, the marshes, beaches and wetlands adjacent to these waters, and the marine life, plant life and wildlife which are dependent thereon and without complying with the requirements of law referred to herein.

100. Plaintiffs have no adequate remedy at law in that a money judgment could not compensate for the inquiry which would be suffered by the plaintiffs and by the class of persons represented by plaintiffs if defendants proceed with the activities plaintiffs seek to enjoin and cause substantial degradation of the quality of water in San Francisco Bay, the Sacramento-San Joaquin Delta, adjacent waters of the Pacific Ocean and the Sacramento and San Joaquin Rivers and further damage and endanger the future of the various species of marine life and wildlife which are dependent in whole or in part on the quality and flows of said waters.

101. The injury caused by said degradation of water quality and the act of defendants complained of herein would be irreparable and irreversible.

PRAYER FOR RELIEF

For the reasons set forth above, plaintiffs pray this Court to enter judgment herein as follows:

1. Declaring and adjudging that the Rivers and Harbors Act of 1899 makes unlawful the operation, construction or commencement or continuance of construction of the Delta Pumping Plant, Tracy Pumping Plant, Peripheral Canal, San Luis Drain, or the East Side Canal until such time as the consent and authorization of the Congress and the approval of the Secretary of the Army and Chief of Engineers has been obtained.

2. Declaring and adjudging that construction of the Peripheral Canal, Delta Pumping Plant, East Side Canal and San Luis Drain cannot commence or proceed further until such time as Congress and the Secretary of the Army and Chief of Engineers have been provided with the following:

(a) A report of the Secretary of the Interior, as required by the Fish and Wildlife Coordination Act, on the wildlife aspects of such projects based on surveys and investigations conducted by the United States Fish and Wildlife Service and the California Department of Fish and Game for the purpose of determining the extent of damage to wildlife resources which would result from such projects;

(b) A report of the Secretary of the Interior as required by the Fish and Wildlife Coordination Act, on the means and measures which would have to be adopted to prevent the loss of or damage to wildlife resources in the San Joaquin and Sacramento Rivers, the Delta, San Francisco Bay and the adjoining portions of the Pacific Ocean as the result of the construction and operation of said facilities.

(c) A report of the Secretary of the Interior pursuant to the National Environmental Policy Act of 1969 of the environmental impact, the adverse environmental effects, the alternatives to, and the irreversible and irretrievable commitments of resources which would result from the construction and operation of the Peripheral Canal, Delta Pumping Plant, Tracy Pumping Plant, East Side Canal and San Luis Drain.

3. Declaring and adjudging that the Secretary of the Army, Chief of Engineers, and the Division Engineer of the South Pacific Division of the Corps of Engineers must give due consideration to the requirements of and the

national policy set forth in the Rivers and Harbors Act of 1899, the National Environmental Policy Act of 1969, the Fish and Wildlife Coordination Act, the National Estuarine Areas Act, and the Federal Water Pollution Control Act in acting or passing upon any applications for approval of the operation or construction of the Peripheral Canal, Tracy Pumping Plant, Delta Pumping Plant, East Side Canal, San Luis Drain, or any related or appurtenant structures.

4. Enjoining the defendants from constructing or continuing the construction of and from operating the Peripheral Canal, Delta Pumping Plant, Tracy Pumping Plant, East Side Canal or San Luis Drain until such time as Congress, the Secretary of the Army, and the Chief of Engineers have authorized the specific diversions of water from and discharge of water into the Delta and Sacramento River which would result from said construction or operation after having been furnished the following:

(a) A report of the Secretary of the Interior as required by the Fish and Wildlife Coordination Act, on the wildlife aspects of such projects based on surveys and investigations conducted by the United States Fish and Wildlife Service and the California Department of Fish and Game for the purpose of determining the extent of damage to wildlife resources which would result from such projects;

(b) A report of the Secretary of the Interior, as required by the Fish and Wildlife Coordination Act, on the means and measures which would have to be adopted to prevent loss of or damage to wildlife resources in the San Joaquin and Sacramento Rivers, the Delta, San Francisco Bay and the adjoining portions of the Pacific Ocean as the result of the construction and operation of said facilities.

(c) A report of the Secretary of the Interior pursuant to the Environmental Policy Act of 1969 of the environmental impact, the adverse environmental effects, the alternatives to, and the irreversible and irretrievable commitments of resources which would result from the construction and operation of the Peripheral Canal, Delta Pumping Plant, Tracy Pumping Plant, East Side Canal and San Luis Drain.

5. Enjoining defendants from submitting to Congress, to the Secretary of the Army or to the Chief of Engineers any proposal or request for authorization or approval of the construction or operation of the Peripheral Canal, Delta Pumping Plant, Tracy Pumping Plant, East Side Canal and San Luis Drain or any related or appurtenant structure unless such proposal or request is accompanied by the reports required by the Fish and Wildlife Coordination Act and the National Environmental Policy Act of 1969 and, in the event such proposals or requests are or have been made by any of the defendants named herein and are not accompanied by said reports, directing said defendant or defendants to submit said reports to the Congress, the Secretary of the Army and the Chief of Engineers in the shortest reasonable time.

6. Enjoining the further operation, construction or participation of the STATE OF CALIFORNIA in the Delta Pumping Plant, the Peripheral Canal, the East Side Canal, the Tracy Pumping Plant and the San Luis Drain until the proper state agencies comply with the dictates of CEQA.

7. For plaintiffs' costs of suit herein, including those costs incurred for expert witness fees, for the reasonable attorneys' fees of plaintiffs and for such other and further relief as the Court may deem proper.

Dated: December 21, 1973.

JOHN B. CLARK
JOHN B. BIGELOW

By JOHN B. BIGELOW
JOHN B. BIGELOW
Attorneys for Plaintiffs
SIERRA CLUB and
HANK SCHRAMM

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[Statement of Service omitted]

STATE DEFENDANTS' ANSWER

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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

[Case Caption omitted]

ANSWER OF STATE DEFENDANTS TO FIRST AMENDED COMPLAINT

Come now the defendants State of California, Norman B. Livermore, Jr., as Secretary for Resources of the State of California, and John R. Teerink, as Director of Water Resources of the State of California, sued herein as Director of the Department of Water Resources of the State of California, sometimes collectively herein referred to as State defendants, and, answering the first amended complaint on file herein, admit, deny, and allege as follows:

FIRST DEFENSE

That the first amended complaint fails to state a claim upon which relief may be granted.

SECOND DEFENSE

That the State of California and State defendants have not consented to be sued herein, nor has any of them.

THIRD DEFENSE

That the above entitled Court lacks jurisdiction over the State and State defendants, and each of them.

FOURTH DEFENSE

That the Court lacks jurisdiction over the subject matter of the first amended complaint.

FIFTH DEFENSE

That there is no Federal question or diversity of citizenship or proper cause for declaratory relief.

SIXTH DEFENSE

That the first amended complaint herein does not state a cause of action under Federal or State statutes.

SEVENTH DEFENSE

That the plaintiffs herein, and each of them, lack standing to sue.

EIGHTH DEFENSE

That the plaintiffs herein, and each of them, are guilty of laches and may not at this late date have the relief prayed, even if it were to be assumed, but not conceded, that there were any claim.

NINTH DEFENSE

Allege that the matter in controversy is not susceptible of evaluation and, therefore, that the State defendants deny that it exceeds $10,000.

TENTH DEFENSE

That the first amended complaint contains no allegations of detriment to the plaintiffs, no allegations of adverse effect upon the plaintiffs or allegations of diversity, the State of California not being a citizen of the United States, and the remaining State defendants in their official capacity not being or acting as citizens of the United States.

ELEVENTH DEFENSE

That there is no justiciable controversy stated in the first amended complaint.

TWELFTH DEFENSE

That the motion of State defendants heretofore made and filed and all points and authorities and matters in support thereof are hereby incorporated herein and made a part hereof and that, there being no cause for relief, the first amended complaint herein and this case, and each of them, should be dismissed.

THIRTEENTH DEFENSE

That the gravamen and gist of the first amended complaint is water quality in the Delta of the Sacramento and San Joaquin Rivers, sometimes herein referred to as the Delta, and that the plaintiffs, or some of them, are already participants in other actions pending in the courts of the State of California.

FOURTEENTH DEFENSE

That there is proper cause for abstention.

FIFTEENTH DEFENSE

That the first amended complaint contains no proper cause for class action.

SIXTEENTH DEFENSE

That the sixth claim for relief is barred by the provisions of section 21167 of the California Public Resources Code which provides in part as follows:

> "Any action or proceeding to attack, review, set aside, void, or annul the following acts or decisions of a public agency on the grounds of noncompliance with this division shall be commenced as follows:
>
> > "(a) An action or proceeding alleging that a public agency is carrying out or has approved a project which may have a significant effect on the environment without having determined whether the project may have a significant effect on the environment shall be commenced within 180 days of the public agency's decision to carry out or approve the project, or, if a project is undertaken without a formal decision by the public agency, within 180 days after commencement of the project. . . ."

That the decision to carry out or approve the project or the commencement of the project all occurred more than 180 days prior to December 27, 1973, the date when plaintiffs' claim for relief under California Environmental Quality Act of 1970 was filed with the Court as the sixth claim for relief.

SEVENTEENTH DEFENSE

That the California Environmental Quality Act is not applicable to the Delta Pumping Plant nor to the California Aqueduct for the reason that the project was planned, constructed, and placed into operation prior to November 23, 1970, the effective date of the Act.

EIGHTEENTH DEFENSE

That the National Environmental Policy Act is not applicable to the Delta Pumping nor the California Aqueduct in that the project was planned, constructed, and put into operation prior to January 1, 1970, the effective date of said Act.

NINETEENTH DEFENSE

1. Answer to paragraph 1 of the complaint on file herein, that State defendants deny each and every, all and singular, the allegations therein for lack of information and belief.

2. Answering paragraph 2 of the complaint on file herein, that State defendants deny each and every, all and singular, the allegation therein for lack of information and belief.

3. Answering paragraph 3 of the complaint on file herein, that State defendants deny each and every, all and singular, the allegations therein for lack of information and belief.

4. Answering paragraph 4 of the complaint on file herein, that State defendants deny each and every, all and singular, the allegations therein for lack of information and belief.

5. Answering paragraph 5 of the complaint on file herein, that State defendants deny each and every, all and singular, the allegations therein for lack of information and belief.

6. Answer paragraph 6 of the complaint, that State defendants admit the allegations therein.

7. Answering paragraph 7 of the complaint, that State defendants admit the allegations therein.

8. Answering paragraph 8 of the complaint, that the State admits the allegations therein.

9. Answering paragraph 9 of the complaint, that the defendants admit the allegations thereof.

10. Answering paragraph 10 of the complaint, that the defendants admit the allegations thereof.

11. Answering paragraph 11 of the complaint, that State defendants admit that Norman B. Livermore, Jr., is the Secretary for Resources of the State of California, allege that he has general supervision over the departments of the Resources Agency of the State of California, allege that he is the officer in charge of the Resources Agency of the State of California, and deny each and every, all and singular, the remaining allegations contained therein.

12. Answering paragraph 12 of the complaint, that State defendants allege that John R. Teerink is the Director of Water Resources of the State of California; that the Director of Water Resources is the officer in charge of the Department of Water Resources of the State of California; that the Department of Water Resources of the State of California is one of the departments under the general supervision of the Secretary for Resources under the statutes therefor made and provided; and State defendants deny each and every, all and singular, the remaining allegations therein.

13. Answering paragraph 13 of the complaint, that State defendants allege that in the performance of their duties and in their operations they have complied with the applicable statutes in such cases made and provided, and will so comply, and State defendants deny each and every, all and singular, the remaining allegations therein.

14. Answering paragraph 14 of the complaint, that State defendants, having no information on the purpose or intention of plaintiffs herein, deny each and every, all and singular the allegations therein for lack of information and belief; and that State defendants deny that State defendants have caused, or will cause, excessive diversion of water from the Sacramento and San Joaquin Rivers, or either of them, or irreparable damage, or any damage, or harm to any person or any property.

15. Answering paragraph 15 of the complaint, that State defendants admit that the Sacramento and San Joaquin Rivers combine and drain the Central Valley of California, and deny each and every, all and singular, the remaining allegations therein for lack of information and belief.

16. Answering paragraph 16 of the complaint, that State defendants admit that the Delta contains navigable waterways which harbor fish and forms of aquatic life, and deny each and every, all and singular, the allegations therein for lack of information and belief.

18. Answering paragraph 18 of the complaint, that State defendants admit that the San Francisco Bay is a body of water affected by the tides, that waters from the Delta are discharged ultimately into the San Francisco Bay through other bays, and deny each and every, all and singular, the remaining allegations therein for lack of information and belief; that State defendants specifically deny that the San Francisco Bay is critically dependent upon continued discharge of fresh water from the Delta.

19. Answering paragraph 19 of the complaint, that State defendants deny each and every, all and singular, the allegations contained therein for lack of information and belief.

20. Answering paragraph 20 of the complaint herein, that State defendants admit that the Burns-Porter Act was adopted in 1959, that the Act authorized the construction of the State Water Project, that the Project would consist of a system of dams, canals, pumping plants, and other facilities designed to divert water in excess of 4,000,000 acre-feet a year from places

of diversion to other parts of the State of California and to various users, that the Burns-Porter Act was submitted to and approved by the voters of the State of California on November 8, 1960. That the State Water Project was designed to operate in coordination with the Central Valley Project, and that some of the essential facilities of the State Water Project are joint-use facilities, which also constitute integral parts of the Central Valley Project of the United States Bureau of Reclamation; and that State defendants deny each and every, all and singular, the remaining allegations therein.

21. Answering paragraph 21 of the complaint, that State defendants admit that the Department of Water Resources has entered into contracts under which it has agreed to use its best efforts to deliver 4.23 million acre-feet of water annually, that the primary purchasers of water are the Kern County Water Agency, which has agreed to purchase 1,153,400 acre-feet annually, and the Metropolitan Water District of Southern California, which has entered into contracts for 2,011,500 acre-feet a year; and that State defendants deny each and every, all and singular, the remaining allegations therein.

22. Answering paragraph 22 of the complaint, that State defendants allege that initially the State Water Project will obtain substantially all of that portion of the 4.2 million acre-feet required annually by said Project from the Sacramento and San Joaquin Rivers and their tributaries, that among the facilities completed or partially constructed for this purpose are the Oroville Dam on the Feather River and the Delta Pumping Plant, which is adjacent to the Delta, that the purpose of the Delta Pumping Plant is to divert approximately 4,000,000 acre-feet of water a year from the Sacramento River and Delta to be transported by means of canals, pumping plants, and other facilities to users in other areas in California; and that State defendants deny each and every, all and singular, the remaining allegations therein.

23. Answering paragraph 23 of the complaint, that State defendants admit that the Delta Pumping Plant is located near a body of water known as Clifton Court Forebay, allege that

Clifton Court Forebay is in an area formerly known as Clifton Court Tract, admit that the Delta Pumping Plant pumps water from Clifton Court Forebay into the California Aqueduct, and deny each and every, all and singular, the remaining allegations therein.

24. Answering paragraph 24 of the complaint herein, that State defendants lack information and belief as to the allegations therein and therefore deny each and every, all and singular, the allegations therein.

25. Answering paragraph 25 of the complaint herein, that State defendants lack information or belief as to the allegations thereof and therefore deny each and every, all and singular, allegations of said paragraph.

26. Answering paragraph 26 of the complaint herein, that State defendants deny each and every, all and singular, the allegations in said paragraph contained for lack of information and belief.

27. Answering paragraph 27 of the complaint herein, that State defendants allege that the Peripheral Canal is planned in the State Water Project and that it is proposed to be about 400 to 500 feet wide and about 42 miles long; allege that said Canal is proposed to be constructed between a point near Hood on the Sacramento River to Clifton Court Forebay near Old River; and that State defendants deny each and every, all and singular, the remaining allegations therein.

28. Answering paragraph 28 of the complaint herein, that State defendants allege that one of the purposes and functions of the Peripheral Canal is to transfer fresh water to the Delta and Tracy Pumping Plants from the Sacramento River, that other purposes of said Canal are the control of salinity intrusion, the maintenance of water quality adequate for irrigation purposes, preservation and enhancement of fish, wildlife, and recreational environment of the Delta, inter alia, and to achieve the same by planned release of fresh water at various points along the Canal aforesaid into the Delta; and that State defendants deny each and every, all and singular, the remaining allegations of said paragraph 28.

29. Answering paragraph 29 of the complaint herein, that State defendants allege that the State of California has expended public funds for engineering design of the Peripheral Canal; that the State has approved and authorized construction of the same; that the State Department of Water Resources is preparing an Environmental Impact Report on the same; that the State proposes to commence construction in 1975 and not prior to that year; and that State defendants deny each and every, all and singular, the remaining allegations therein for lack of information and belief.

30. Answering paragraph 30 of the complaint herein, that State defendants allege that the Tracy Pumping Plant, East Side Canal and San Luis Drain are Federal project facilities, none of which is designed, constructed, operated, or controlled by any of the State defendants, that no claim is stated against State defendants upon which relief may be granted; and that State defendants deny each and every, all and singular, the remaining allegations therein contained for lack of information and belief.

31. Answering paragraph 31 of the complaint herein, that State defendants incorporate herein and restate the allegations in answer of State defendants to paragraph 30, hereinabove, and deny each and every, all and singular, the remaining allegations in paragraph 31 of the complaint contained.

32. Answering paragraph 32 of the complaint herein, that State defendants allege that the proposed diversions of water from the Sacramento and San Joaquin Rivers by means of the Peripheral Canal, and East Side Canal will from time to time reduce the flow of water in the Sacramento River, that upstream storage facilities' releases will from time to time increase the flow of water in the Sacramento River, that at present the operation of the Tracy Pumping Plant and the Delta Pumping Plant contribute to a reversal of direction and reduction of net

flow from time to time in some channels of the Delta; and that State defendants deny each and every, all and singular, the remaining allegations in said paragraph 32; and that State defendants further allege that the control of salinity intrusion, and incursion, and its effect upon the flow of water in the Delta has been the subject of protracted public hearings, that a decision has been made thereon after such hearings by the State Water Resources Control Board of the State of California, a public agency vested with legal authority to establish water quality standards pursuant to State law as well as pursuant to the Federal Water Pollution Control Law, that the Department of Water Resources of the State of California and other departments and entities of the Resources Agency of the State of California as well as the Sierra Club, plaintiff herein, have participated in such hearings; that the State regulatory agency aforesaid received evidence relating to the volume of stream flow, direction of flow, water levels, currents, water diversion, and the effect that various alterations of those factors might have upon the qualities of water in the Delta aforesaid for beneficial uses within the meaning of the statutes in such cases made and provided, including irrigation, navigation, recreation, esthetics, and fish and wildlife, inter alia; that the function of prescribing water quality standards and the exercise of the right to divert water in conformance with such standards present questions of State law within the province of the State Water Resources Control Board aforesaid. That the decision aforesaid by State Water Resources Control Board was made in the year 1971; and that thereafter, judicial review of such decision having been expressly provided for by the statutes and laws of the State of California, two suits were filed in the Superior Court of the State of California in and for the County of Sacramento, and the same were consolidated and are now pending; that the Sierra Club is a party therein; that the plaintiffs above-named have failed to exhaust their remedies expressly provided for in the State courts. That their claim for relief herein is premature and that this Court may be, and is, beholden, in the exercise of sound discretion to abstain from

exercising jurisdiction to the end that the State of California may initially declare and interpret the State law and applicable provisions of the Federal Water Pollution Control Act.

33. Answering paragraph 33 of the complaint herein, that State defendants deny each and every, all and singular, the allegations therein contained.

34. Answering paragraph 34 of the complaint herein, that State defendants deny each and every, all and singular, the allegations therein contained.

35. Answering paragraph 35 of the complaint herein, that State defendants deny each and every, all and singular, the allegations therein contained.

36. Answering paragraph 36 of the complaint herein, that State defendants deny each and every, all and singular, the allegations therein contained.

37. Answering paragraph 37 of the complaint herein, that State defendants deny each and every, all and singular, the allegations therein contained.

38. Answering paragraph 38 of the complaint herein, that State defendants do hereby incorporate by reference and make a part hereof as though fully set forth at this place, their responses, and each of them, to paragraphs 1 to 37 of the complaint, both inclusive.

39. Answering paragraph 39 of the complaint herein, that State defendants deny each and every, all and singular, the allegations contained therein.

40. Answering paragraph 40 of the complaint herein, that State defendants allege that portions of the Sacramento River and San Joaquin Rivers within the Delta are navigable waters; that portion of San Francisco Bay are navigable; and that State defendants deny each and every, all and singular, the remaining allegations in paragraph 40.

41. Answering paragraph 41 of the complaint herein, that State defendants deny each and every, all and singular, the allegations therein for lack of information and belief.

42. Answering paragraph 42 of the complaint herein, that State defendants allege that the East Side Canal, San Luis Drain, and Tracy Pumping Plant, and each of them, are Federal facilities over which the State defendants have no jurisdiction or control; that State defendants deny that State works come within the purview of the Rivers and Harbors Act of 1899; and that State defendants further deny that any of such facilities are within the purview of section 9 of said Rivers and Harbors Acts, and that State defendants further deny each and every, all and singular, the remaining allegations therein.

43. Answering paragraph 43 of the complaint herein, that State defendants deny each and every, all and singular, the allegations contained therein, and, further, specifically deny that any such facilities come within the purview of section 10 of said Rivers and Harbors Act.

44. Answering paragraph 44 of the complaint herein, that State defendants deny each and every, all and singular, the allegations contained therein.

45. Answering paragraph 45 of the complaint herein, that State defendants deny each and every, all and singular, the allegations contained therein.

46. Answering paragraph 46 of the complaint herein, that State defendants deny each and every, all and singular, the allegations contained therein.

47. Answering paragraph 47 of the complaint herein, that State defendants deny each and every, all and singular, the allegations therein for lack of information and belief.

48. Answering paragraph 48 of the complaint herein, that State defendants deny each and every, all and singular, the allegations therein.

49. Answering paragraph 49 of the complaint herein, that State defendants hereby incorporate herein and make a part hereof their responses to paragraphs 1 to 48, both inclusive, of the complaint as though set forth at length at this place.

50. Answering paragraph 50 of the complaint herein, that State defendants deny each and every, all and singular, the allegations contained therein and allege that the statute therein is misquoted.

51. Answering paragraph 51 of the complaint herein, that State defendants deny each and every, all and singular, the allegations contained therein for lack of information and belief.

52. Answering paragraph 52 of the complaint herein, that State defendants herein incorporate by reference and make a part hereof their responses to 1 through 51 of the complaint, both inclusive.

53. Answering paragraph 53 of the complaint herein, that State defendants deny each and every, all and singular, the allegations therein contained; and that State defendants allege that they have complied with any applicable requirements of the Fish and Wildlife Coordination Act in connection with the construction of the Delta Pumping Plant.

54. Answering paragraph 54 of the complaint herein, that State defendants deny each and every, all and singular, the allegations therein contained.

55. Answering paragraph 55 of the complaint herein, that State defendants deny each and every, all and singular, the allegations therein contained.

56. Answering paragraph 56 of the complaint herein, that State defendants deny each and every, all and singular, the allegations therein contained and allege that the statute is found in its own manner and form.

57. Answering paragraph 57 of the complaint herein, that State defendants deny each and every, all and singular, the allegations therein contained for lack of information and belief.

58. Answering paragraph 58 of the complaint herein, that State defendants deny each and every, all and singular, the allegations therein contained, and allege that the statute is found in its own manner and form.

59. Answering paragraph 59 of the complaint herein, that State defendants deny each and every, all and singular, the allegations therein contained.

60. Answering paragraph 60 of the complaint herein, that State defendants deny each and every, all and singular, the allegations therein contained.

61. Answering paragraph 61 of the complaint herein, that State defendants herein deny each and every, all and singular, the allegations therein.

62. Answering paragraph 62 of the complaint herein, that State defendants deny each and every, all and singular, the allegations therein.

63. Answering paragraph 63 of the complaint herein, that State defendants hereby incorporate herein and make a part hereof their responses to paragraphs 1 through 62, both inclusive, as though set forth at length at this place.

64. Answering paragraph 64 of the complaint herein, that State defendants deny each and every, all and singular, the allegations therein, and allege that the statute is found in its own manner and form.

65. Answering paragraph 65 of the complaint herein, that State defendants deny each and every, all and singular, the allegations therein, and allege that the statute is found in its own manner and form.

66. Answering paragraph 66 of the complaint herein, that State defendant deny each and every, all and singular, the allegations therein, and allege that the statute is found in its own manner and form.

67. Answering paragraph 67 of the complaint herein, the State defendants lack information or belief as to the allegations thereof and therefore deny each and every, all and singular, the allegations of said paragraph.

68. Answering paragraph 68 of the complaint herein, that State defendants deny each and every, all and singular, the allegations therein for lack of information and belief.

69. Answering paragraph 69 of the complaint herein, that State defendants deny each and every, all and singular, the allegations therein for lack of information and belief.

70. Answering paragraph 70 of the complaint herein, that State defendants deny each and every, all and singular, the allegations therein for lack of information and belief.

71. Answering paragraph 71 of the complaint herein, that State defendants hereby incorporate herein and make a part hereof their responses to paragraphs 1 through 70 of the complaint, both inclusive, as though they were fully set forth at length at this place.

72. Answering paragraph 72 of the complaint herein, that State defendants deny each and every, all and singular, the allegations therein, and allege that the statute is found in its own manner and form.

73. Answering paragraph 73 of the complaint herein, that State defendants admit that portions of the Sacramento River and the San Joaquin River within the said Delta are estuaries of the United States; and that State defendants deny each and every, all and singular, the remaining allegations therein.

74. Answering paragraph 74 of the complaint herein, that State defendants are unable from the vagueness of the language therein to ascertain its meaning and have no information and belief thereon; and that State defendants deny each and every, all and singular, the allegations therein for lack of information and belief.

75. Answering paragraph 75 of the complaint herein, that State defendants deny each and every, all and singular, the allegations therein.

76. Answering paragraph 76 of the complaint herein, that State defendants deny each and every all and singular, the allegations therein.

77. Answering paragraph 77 of the complaint herein, that State defendants deny each and every, all and singular, the allegations therein, and allege that the statute is found in its own manner and form.

78. Answering paragraph 78 of the complaint herein, that State defendants deny each and every, all and singular, the allegations therein, except that State defendants admit the quoted portion is a part of said executive order 11507.

79. Answering paragraph 79 of the complaint herein, that State defendants deny each and every, all and singular, the allegations therein.

80. Answering paragraph 80 of the complaint herein, that State defendants deny each and every, all and singular, the allegations therein, contained for lack of information and belief.

81. Answering paragraph 81 of the complaint herein, that State defendants deny each and every, all and singular, the allegations therein for lack of information and belief.

82. Answering paragraph 82 of the complaint herein, that State defendants deny each and every, all and singular, the allegations therein for lack of information and belief.

83. Answering paragraph 83 of the complaint herein, that State defendants deny each and every, all and singular, the allegations therein for lack of information and belief.

84. Answering paragraph 84 of the complaint herein, that State defendants deny each and every, all and singular, the allegations therein.

85. Answering paragraph 85 of the complaint herein, that State defendants deny each and every, all and singular, the allegations therein.

86. Answering paragraph 86 of the complaint herein, that the State defendants herein incorporate by reference and make a part hereof their responses to paragraphs 1 through 85 of the complaint, both inclusive.

87. Answering paragraph 87 of the complaint herein, that the State defendants admit that the California Environmental Quality Act of 1970 is contained in the California Public Resources Code Division 10 and allege that the statute is found in its own manner and form, and deny each and every, all and singular, the allegations therein contained.

88. Answering paragraph 88 of the complaint herein, that State defendants allege that section 21100 of the Public Resources Code is a part of the California Environmental Quality Act of 1970 which is found in its own form and manner, and deny each and every, all and singular, the allegations therein.

89. Answering paragraph 89 of the complaint herein, that State defendants allege that section 21100 of the Public Resources Code is found in its own manner and form, and deny each and every, all and singular, the allegations therein.

90. Answering paragraph 90 of the complaant herein, that State defendants allege that section 21101 of the Public Resources Code is found in its own manner and form, and deny each and every, all and singular, the allegations therein.

91. Answering paragraph 91 of the complaint herein, that State defendants allege that section 21102 of the Public Resources Code is found in its own manner and form, and deny each and every, all and singular, the allegations thereof.

92. Answering paragraph 92 of the complaint herein, that State defendants admit that the Peripheral Canal is a project within the State of California, which will have a significant effect on the environment and deny each and every, all and singular, the remaining allegations therein.

93. Answering paragraph 93 of the complaint herein, that State defendants deny each and every, all and singular, the allegations therein.

94. Answering paragraph 94 of the complaint herein, the State defendants deny each and every, all and singular, the allegations therein.

95. Answering paragraph 95 of the complaint herein, that the State defendants allege the powers and duties of the Secretary for Resources and the Director of Water Resources are prescribed by statutes found in their own manner and form, and deny each and every, all and singular, the allegations therein.

96. Answering paragraph 96 of the complaint herein, that State defendants deny each and every, all and singular, the allegations therein.

97. Answering paragraph 97 of the complaint herein, the State defendants deny each and every, all and singular, the allegations therein.

98. Answering paragraph 98 of the complaint herein, the State defendants deny each and every, all and singular, the allegations therein.

99. Answering paragraph 99 of the complaint herein the State defendants deny each and every, all and singular, the allegations therein.

100. Answering paragraph 100 of the complaint herein, the State defendants deny each and every, all and singular, the allegations therein.

101. Answering paragraph 101 of the complaint herein, the State defendants deny each and every, all and singular, the allegations therein.

PRAYER

WHEREFORE, State defendants, State of California, Norman B. Livermore, Jr., as Secretary for Resources of the State of California, and John R. Teerink, as Director of Water Resources of the State of California, sued herein as Director of the Department of Water Resources of the State of California, and each of them, pray judgment as follows:

1. That the complaint and the cause, and each of them herein, be dismissed.

2. That State defendants, and each of them, have judgment.

3. That declaratory relief be denied.

4. That injunction be denied.

5. That plaintiffs take nothing.

6. For costs, disbursements, and expenses.

7. For attorneys' fees.

8. For such other and further relief as may be meet in the premises.

Dated: June 5, 1974

EVELLE J. YOUNGER
Attorney General
CARL BORONKAY
Assistant Attorney General

BERTRAM G. BUZZINI
Deputy Attorney General
Attorney for State Defendants

[Statement of Service omitted]

FEDERAL DEFENDANTS' ANSWER

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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

[Case caption omitted]

ANSWER OF UNITED STATES DEFENDANTS

Come now the United States defendants, Rogers C.B. Morton, as Secretary of the Interior of the United States; Ellis L. Armstrong, as Commissioner of the United States Bureau of Reclamation; Stanley R. Resor, as Secretary of the Army of the United States; Frederick B. Clarke, as Chief of Engineers of the Corps of Engineers of the United States Army; Brigadier General Frank A. Camm, as Division Engineer of the South Pacific Division of the Corps of Engineers; by James L. Browning, Jr. United States Attorney, and Francis B. Boone, Assistant United States Attorney, and for their answer and defenses to plaintiffs' Complaint herein admit, deny, allege, and state as follows:

SECOND DEFENSE

This is a suit against the United States to which it has not consented, and therefore the Court lacks jurisdiction over the person, the United States officers named herein as defendants.

THIRD DEFENSE

The Court lacks jurisdiction over the subject matter in the Complaint.

FOURTH DEFENSE

The Complaint does not state a cause of action under the United States Constitution or any Federal statutes or acts of Congress.

FIFTH DEFENSE

The plaintiffs lack the standing to sue.

SIXTH DEFENSE

1. The allegations in paragraph 1 of the Complaint are conclusions of law which require no answer, other than as stated in the foregoing defenses.

2. The defendants admit the allegation in paragraph 2 of the Complaint that the Sierra Club is a non-profit California corporation. The defendants deny the allegation that the Sierra Club and its members are adversely affected and aggrieved by the acts complained of in the Complaint. The defendants allege that they are without information or belief sufficient to enable them to answer the remaining allegations in paragraph 2 of the Complaint, and therefore on that ground deny each and every such allegation.

3. The defendants allege that they are without information or belief sufficient to enable them to answer the allegations contained in paragraph 3 of the Complaint, and therefore on that ground deny each and every such allegation.

4. The defendants allege that they are without information or belief sufficient to enable them to answer the allegations contained in paragraph 4, and therefore on that ground deny each and every such allegation.

5. The defendants allege that they are without information or belief sufficient to enable them to answer the allegations contained in paragraph 5 of the Complaint, and therefore on that ground deny each and every such allegation.

6. The defendants allege that they are without information or belief sufficient to enable them to answer the allegations contained in paragraph 6 of the Complaint and therefore on that ground deny each and every such allegation.

7. The defendants admit the allegations contained in paragraph 7 of the Complaint.

8. The defendants admit the allegations contained in paragraph 8 of the Complaint.

9. The defendants admit that Stanley R. Resor was the Secretary of the Army of the United States at the time of the institution of this action; however, the present Secretary of the Army is Robert F. Froehlke.

10. The defendants admit the allegations contained in paragraph 10 of the Complaint.

11. The defendants admit the allegations contained in paragraph 11 of the Complaint.

12. The allegations contained in paragraph 12 of the Complaint do not pertain to the defendants herein. Therefore, the defendants neither admit nor deny same, since they apply to the State of California defendants only.

13. The allegations contained in paragraph 13 of the Complaint do not apply to the defendants herein. Therefore, the defendants neither admit nor deny same, since they apply to the State of California defendants only.

14. With respect to the allegations contained in paragraph 14 of the Complaint, the plaintiffs merely set forth the relief which they allegedly are seeking from this Court. Therefore, the allegations require no answer and the defendants neither admit nor deny same. However, defendants do deny that the United States Bureau of Reclamation has in any way proceeded or will in the future proceed in any activity described in paragraph 14 without having complied with the laws and statutes of the United States.

15. The plaintiffs' allegations in paragraph 15 of the Complaint relate to the purpose of the action as described by the plaintiffs. The defendants neither admit nor deny the purpose of the action as alleged by the plaintiff. However, the defendants deny that the defendants have or will cause excessive diversions of water from the Sacramento and San Joaquin Rivers and the defendants further deny that there will be permanent and irreparable damage to fisheries, public health, and recreation caused by any diversions of water by the defendants.

16. The defendants admit the allegations contained in paragraph 16 of the Complaint.

17. The defendants admit the allegations contained in paragraph 17 of the Complaint.

18. The defendants admit the allegations contained in paragraph 18 of the Complaint.

19. The defendants deny the allegation contained in paragraph 19 of the Complaint that the water quality of San Francisco Bay is critically dependent upon continued discharge of fresh water from the Delta to provide flushing and circulation necessary to reduce salinity content, phosphate concentration, and pollution of the waters of San Francisco Bay. The

defendants admit the remaining allegations contained in paragraph 19 of the Complaint.

20. The defendants admit that the Secretary of the Interior is charged with the responsibility for preserving, conserving, and protecting the fish and wildlife and other natural resources of the United States. The defendants deny each and every other allegation contained in paragraph 20 of the Complaint.

21. Answering paragraph 21 of the Complaint, the defendants deny that the State Water Project is financed in large part by Federal funds or that the State's portion of the joint use facilities constitute integral parts of the Central Valley Project of the United States Bureau of Reclamation. The defendants neither admit nor deny the remaining allegations in paragraph 21 of the Complaint, since they apply to the State of California defendants.

22. The defendants neither admit nor deny the allegations contained in paragraph 22 of the Complaint, since they apply to the State of California defendants.

23. The defendants deny that the Delta Pumping Plant has been financed in part with money contributed by the Federal Government and is being constructed with the assistance of and in cooperation with the United States Bureau of Reclamation, as alleged in paragraph 23 of the Complaint. The defendants neither admit nor deny the remaining allegations in paragraph 23 of the Complaint, since they apply to the State of California defendants.

24. The defendants deny that the Tracy Pumping Plant is located on a body of water known as Clifton Court Forebay. Defendants further deny that the Bureau of Reclamation took any part in excavating and building dikes around the periphery of an area of land within the Delta formerly known as Clifton Court Tract. The defendants neither admit nor deny the other allegation in paragraph 24 of the Complaint, since it applies to the State of California defendants.

25. The defendants admit the allegations contained in paragraph 25 of the Complaint.

26. In answering the allegations contained in paragraph 26 of the Complaint, the defendants allege that the use and purpose of the Tracy Pumping Plant is not correctly described in said paragraph 26. The Plant is located in the southern Delta and diverts water from Old River, one of the channels of the Delta. The water diverted is a mixture of waters from both Sacramento and San Joaquin River Basins. The defendants admit that water is transmitted from the Tracy Pumping Plant through the Delta-Mendota Canal to various locations in the Central Valley of California.

27. In answering paragraph 27 of the Complaint the defendants allege that the annual diversion of water at the Tracy Pumping Plant varies from year to year. Defendants do not, however, deny the substance of paragraph 27 in the Complaint.

28. In response to the allegations contained in paragraph 28 of the Complaint the defendants allege that the Bureau of Reclamation proposes to finance, construct, and operate the so-called "Peripheral Canal" only upon proper authorization by the Congress of the United States and upon appropriation of funds therefor from the said Congress of the United States. Since Congress has not authorized construction of the Peripheral Canal as a Federal facility and has not appropriated money for the construction and operation thereof, the allegations contained in paragraph 28 of the Complaint are denied as to the Bureau of Reclamation proposing to finance, construct, and operate the Canal at this time.

29. In answering paragraph 29 of the Complaint the defendants admit that one of the purposes and functions of the Peripheral Canal is to transport fresh water to the Delta and Tracy Pumping Plants from the Sacramento River. Defendants further allege that the proposed Peripheral Canal would have many other important purposes, such as salinity control in the

Delta, maintenance of water quality, protection and preservation and enhancement of fish and wildlife and recreational environment, to name a few. The defendants deny each and every remaining allegation of said paragraph 29 of the Complaint.

30. The defendants deny that the Bureau of Reclamation proposes to commence excavation for the Peripheral Canal in the near future. Defendants allege that the Bureau of Reclamation will not take part in the construction of the Peripheral Canal until Congressional authorization therefor. Defendants deny that the Department of the Interior has submitted to Congress a recommendation that the Federal Government participate in the financing and construction of the Peripheral Canal. Defendants are without information or belief sufficient to enable them to answer the remaining allegations in paragraph 30, and therefore on that ground deny each and every such allegation.

31. In answering paragraph 31 the defendants deny that construction is about to commence on the East Side Canal. Defendants further allege that such construction by the Bureau of Reclamation will not be undertaken until and unless Congressional authorization is received for the Project. Defendants further deny that the Bureau of Reclamation proposes to divert two and one-half million acre-feet (or any amount) of water annually from the Sacramento and San Joaquin Rivers and their tributaries by means of a proposed canal known as the East Side Canal, reservoirs, pumping plants, and other related facilities collectively referred to as the East Side Canal without prior Congressional authorization and appropriations therefor.

32. The defendants admit that the Bureau of Reclamation has commenced construction of a facility known as the "San Luis Drain" for the purpose of collecting water drained from agricultural lands in the San Joaquin Valley as said project was authorized by Public Law 86-488, approved July 3, 1960. The defendants deny the allegations in paragraph 32 of the Complaint not herein specifically admitted.

33. The defendants deny each and every allegation contained in paragraph 33 of the Complaint.

34. The defendants deny each and every allegation contained in paragraph 34.

35. The defendants deny each and every allegation in paragraph 35 of the Complaint.

36. Defendants deny that diversions of water proposed by the Bureau of Reclamation will increase salinity of the Sacramento River and Delta so as to alter and adversely affect marine life and the habitat of migratory birds in said waters and in wetlands, marshes, and other adjacent areas.

37. The defendants deny each and every allegation contained in paragraph 37 of the Complaint.

38. The defendants deny each and every allegation contained in paragraph 38 of the Complaint.

39. In answering paragraph 39 of the Complaint the defendants here refer to and incorporate herein as if fully set forth at length paragraphs 1 through 38 of this Answer.

40. In answering paragraph 40 of the Complaint the defendants herein allege that the construction and operation of the Tracy Pumping Plant and the construction of the San Luis Drain have been authorized by Congress and funds for the construction have been lawfully appropriated for the purposes for which they were used. Construction of the Peripheral Canal and the East Side Project will not be undertaken until lawfully authorized by Congress and until all requirements for such authorization and appropriation for construction have been made. Therefore, the defendants deny each and every allegation contained in paragraph 40 of the Complaint relating to a Federal Peripheral Canal, the Tracy Pumping Plant, the San Luis Drain, and the East Side Canal.

41. The defendants admit the allegations contained in paragraph 41 of the Complaint.

42. Defendants deny the allegations contained in paragraph 42 of the Complaint.

43. In answering paragraph 43 of the Complaint the defendants deny that the operation of the facilities described in said paragraph would cause or result in the diversion of water from or the discharge of water into navigable water of the United States, which diversion and discharge are unlawful in the absence of the approval of the Secretary of the Army and the Chief of Engineers required by the Rivers and Harbors Act of 1899. Defendants admit the remaining allegations in paragraph 43 of the Complaint.

44. Defendants deny each and every allegation contained in paragraph 44 of the Complaint.

45. Defendants deny each and every allegation in paragraph 45 of the Complaint.

46. Defendants deny each and every allegation contained in paragraph 46 of the Complaint.

47. In answering paragraph 47 of the Complaint the defendants deny that the construction or operation of the Peripheral Canal, Delta Pumping Plant, San Luis Drain, East Side Canal, and Tracy Pumping Plant are unlawful pursuant to Section 403 of the Rivers and Harbors Act of 1899 for any reason. Defendants further deny that these projects result in the continuing and substantial destructive alteration of the Delta and the San Francisco Bay environment and that the operation of the facilities is in violation of the statutory jurisdiction and authority of the State of California and the Bureau of Reclamation. Defendants further deny that the operation is detrimental to the rights and interests of the plaintiffs. Further, the defendants deny that the operation of the Tracy Pumping Plant and the Delta Pumping Plant has caused direct damage to fish and wildlife and recreational capacity of the Delta region. The defendants admit the remaining allegations in paragraph 47 of the Complaint.

48. The defendants admit that Congress has not approved the diversion of water from and discharge of water into navigable waters of the United States, the alteration and modification of the course, location, condition, and capacity of said waters, or the obstruction to the navigable capacity of said waters which may be caused by or result from the construction or operation of the Peripheral Canal or the East Side Canal. The defendants deny the allegation that Congress has not approved the diversion of water from and the discharge of water into navigable waters of the United States; the alteration and modification of the course, location, condition, and capacity of said waters; or the obstruction to the navigable capacity of said waters which may be caused by or result from the construction or operation of the Tracy Pumping Plant and the San Luis Drain.

49. The defendants admit the allegations contained in paragraph 49 of the Complaint.

50. In answering paragraph 50 of the Complaint, the defendants refer to and incorporate herein as if fully set forth at length the paragraphs 1 through 49 of this Answer.

51. The defendants admit that the quotation contained in paragraph 51 of the Complaint is a correct quotation of Section 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. § 407.

52. The defendants deny each and every allegation contained in paragraph 52 of the Complaint.

53. In answering paragraph 53 of the Complaint the defendants refer to and incorporate herein as if fully set forth paragraphs 1 through 52 of this Answer.

53. In answering paragraph 53 of the Complaint the defendants refer to and incorporate herein as if fully set forth paragraphs 1 through 52 of this Answer.

54. The defendants deny the allegations contained in paragraph 54 of the Complaint.

55. The defendants admit that the operation of the Tracy Pumping Plant and the Delta Pumping Plant constitute or result in the diversion of waters from the Sacramento or San Joaquin Rivers. The defendants further admit that if and when authorized and constructed the East Side Canal and the Peripheral Canal will result in diversion of water from the Sacramento or San Joaquin Rivers. Defendants further admit that the State of California and the United States of America propose to divert in excess of seven million acre-feet of water per year from the Sacramento-San Joaquin Rivers and Delta area and their tributaries upon ultimate development. Defendants deny the remaining allegations contained in paragraph 55 of the Complaint.

56. Defendants deny each and every allegation contained in paragraph 56 of the Complaint.

57. In answering paragraph 57 of the Complaint the defendants admit that this may be a correct description of Section 2(b) of the Fish and Wildlife Coordination Act, 16 U.S.C. § 662(b), but allege that the best evidence is the quotation of the section itself.

58. The defendants deny the allegations contained in Section 58 of the Complaint.

59. The defendants admit that the quotation from Section 2(b) of the Fish and Wildlife Coordination Act contained in paragraph 59 of the Complaint may be an accurate partial quote.

60. The defendants deny the allegations contained in paragraph 60 of the Complaint.

61. The defendants deny the allegations contained in paragraph 61 of the Complaint.

62. The defendants deny the allegations contained in paragraph 62 of the Complaint.

63. The defendants deny the allegations contained in paragraph 63 of the Complaint.

64. In answering paragraph 64 of the Complaint the defendants refer to and incorporate herein as if fully set forth at length paragraphs 1 through 63 of this Answer.

65. The defendants admit the allegations contained in paragraph 65 of the Complaint may be a correct description of the section referred to, but allege that the best evidence is the exact quotation of the section itself.

66. The defendants admit the allegations contained in paragraph 66 of the Complaint may be correct description of the section referred to, but allege that the best evidence is the exact quotation of the section itself.

67. The defendants admit the allegations contained in paragraph 67 of the Complaint may be a correct description of the section referred to, but allege that the best evidence is the exact quotation of the section itself.

68. The defendants deny each and every allegation contained in paragraph 68 of the Complaint.

69. In answering paragraph 69 of the Complaint the defendants allege, as set forth elsewhere in this Answer, the Congress of the United States has not authorized construction of the Peripheral Canal or the East Side Canal. Reports on feasibility of the Peripheral Canal and the East Side Canal have not been submitted to Congress for consideration. When they are submitted they will contain an environmental statement and all other required statements and reports. An environmental statement on the San Luis Drain is being processed as required by administrative procedures and will be filed with the President's Council on Environmental Quality when the administrative requirements have been complied with.

70. The defendants admit the allegations contained in paragraph 70 of the Complaint; however, defendants specifically deny the legal necessity of submitting a detailed statement with respect to the environmental impact, the adverse environmental effects, or the irreversible or irretrievable commitments of resources insofar as the Tracy Pumping Plant is

concerned. The Tracy Pumping Plant has been in operation since June 1971. The defendants allege and aver that the National Environmental Policy of 1969 does not require or call for retroactive effect. With respect to the San Luis Drain, an environmental statement on the San Luis Drain is being processed and will be filed with the President's Council on Environmental Quality.

71. With respect to allegation No. 71 in the Complaint, the defendants refer to and incorporate herein as if fully set forth at length paragraphs 1 through 70 of this Answer.

72. The defendants admit the allegations contained in paragraph 72 of the Complaint may be a correct description of the sections referred to, but allege that the best evidence is the exact quotation of the sections themselves.

73. The defendants admit the allegations contained in paragraph 73 of the Complaint.

74. The defendants admit the allegations contained in paragraph 74 of the Complaint.

75. The defendants deny the allegations contained in paragraph 75 of the Complaint.

76. The defendants admit the allegations contained in paragraph 76 of the Complaint, except that the citation is inaccurate; 33 U.S.C.§§1151, et seq.

77. The defendants admit that the quotation contained in paragraph 77 of the Complaint is an accurate excerpt from Section 1171(a) of the Federal Water Pollution Control Act.

78. The defendants admit that the statement in paragraph 78 of the Complaint is an accurate excerpt from Executive Order 11507, 35 Federal Register 2573 (1970).

79. The defendants deny the allegations contained in paragraph 79 of the Complaint.

80. The defendants deny the allegations contained in paragraph 80 of the Complaint.

81. The defendants admit the allegations contained in paragraph 81 of the Complaint, except that defendants allege that Robert F. Froehlke is the Secretary of the Army.

82. The defendants admit the allegations contained in paragraph 82 of the Complaint.

83. In answering paragraph 83 the defendants deny that they can authorize or approve the construction or operation of the Peripheral Canal, Delta Pumping Plant, Tracy Pumping Plant, East Side Canal, or San Luis Drain since only Congress may authorize, approve, and appropriate funds for the construction of a Federal project. The defendants admit that in recommending construction of the Peripheral Canal and the East Side Canal they must comply with all applicable Federal Regulations and statutes.

84. The defendants deny the allegations contained in paragraph 84 of the Complaint.

85. The defendants deny the allegations contained in paragraph 85 of the Complaint.

86. In answering paragraph 86 of the Complaint the defendants deny that there is a present controversy between the plaintiffs and the defendants. The United States defendants admit that they propose to proceed with the operation of the Tracy Pumping Plant. The United States defendants deny that they propose to construct the Peripheral Canal and the East Side Canal without first obtaining the consent of Congress. The United States defendants deny that if the Congress of the United States authorizes the construction of the Peripheral Canal and the East Side projects that the Secretary of the Army and the Chief of Engineers must furnish approval for such projects.

87. The defendants deny the allegations contained in paragraph 87 of the Complaint.

88. The defendants deny the allegations contained in paragraph 88 of the Complaint.

WHEREFORE, the defendants pray this Court enter judgment dismissing the Complaint, denying the declaratory relief, denying the injunctive relief, and awarding costs to the defendants.

Dated: December 6, 1971.

JAMES L. BROWNING, JR.
United States Attorney

FRANCIS B. BOONE

Francis B. Boone
Assistant United States Attorney

Attorneys for United States Defendants.

[Statement of Service omitted]

DECISIONS OF COURT OF APPEALS AND DISTRICT COURT

[The decision of the U.S. Court of Appeal is reprinted as an Appendix to the Petition for Writ of Certiorari filed by State of California *et al.* in No. 79-1252, at pages 2-65 thereof. The decision of the district court is reprinted as a Supplemental Appendix to the petition for Writ of Certiorari filed by State of California *et al.* in No. 29-1252, at pages 1-69 thereof.]

PRE-TRIAL ORDER

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

[Case caption omitted]

AGREED PRE-TRIAL ORDER RESPECTING THE FIRST PHASE OF BIFURCATED TRIAL

A pre-trial conference in this matter was held on June 10, 1974, before United States District Judge Charles B. Renfrew. All parties were present by their counsel. This order, having been prepared with the assistance of United States Magistrate Owen E. Woodruff, Jr. pursuant to a prior order of the Court and having been submitted by the parties as their proposed agreed pre-trial order respecting the first phase of this bifurcated trial and all parties having consented to its entry, is adopted, pursuant to Local Rules 104 through 107, as the Pre-Trial Order in this action.

* * * *

3. *Undisputed Facts*

All parties have stipulated that the following facts are true and correct (for ease of reference, the letter designating each exhibit is set forth in the margin opposite the first reference such exhibit).

3.1 Plaintiff Sierra Club is a non-profit California corporation and from 1892 to the present has maintained its principal office in San Francisco, California.

3.2 The Sierra Club has in excess of 130,000 members of whom more than 40,000 live in the San Francisco Bay and the Sacramento-San Joaquin Delta (the Delta) areas.

3.3 The stated purposes of the Sierra Club include the preservation and conservation of the natural resources, fish and wildlife of the United States, including its rivers, bays, wetlands, delta and estuarine areas. Included in the membership of the Sierra Club are many persons who use the waters referred to in the complaint for recreational purposes, including but not limited to boating, fishing and swimming.

3.4 The Sierra Club has brought this action in behalf of its members, as well as in its own behalf, and will adequately represent the interests of such persons.

3.5 Plaintiff Friends of the Earth is a non-profit corporation organized and operating under the laws of the State of New York, with a principal place of business in San Francisco, California. Its stated purposes include the preservation, restoration and rational use of the environment.

3.6 Plaintiff Hank Schramm is and has been engaged for the past 20 years in the business of commercial fishing and the operation of sports-fishing party boats in the waters of San Francisco Bay and of the Pacific Ocean in the region of San Francisco. Hank Schramm has an economic interest and depends for his livelihood on the maintenance, preservation and conservation of sports and commercial fisheries in San Francisco Bay and in the adjoining waters of the Pacific Ocean.

3.7 Plaintiff William Dixon is a lifelong resident of the San Francisco Bay Area and owns substantial property in the Delta, including a partnership interest in the St. Germain Duck Club on Simmons Island. William Dixon has an economic interest in the maintenance, preservation and conservation of adequate non-polluted supplies of water in the Delta and San Francisco Bay regions.

3.8 Defendant Rogers C. B. Morton is the Secretary of the Interior of the United States and is responsible for the administration of the United States Department of the Interior.

3.9 Defendant Gilbert G. Stamm is the Commissioner of the Bureau of Reclamation of the United States Department of the Interior.

3.10 Defendant Howard H. Calloway is the Secretary of the Army of the United States.

3.11 Defendant William C. Gribble, Jr. is the Chief of Engineers of the United States Army and the Administrator of the United States Corps of Engineers.

3.12 Defendant George B. Fink is the Division Engineer of the South Pacific Division of the United States Army Corps of Engineers and maintains his office in the City and County of San Francisco, State of California. Included within the geographic boundaries of the South Pacific Division of the Corps of Engineers are the Sacramento River, the Sacramento-San Joaquin Delta, San Francisco Bay and adjoining waters of the Pacific Ocean.

3.13 Defendant Colonel Frederick J. Rockwell, U.S.A., is District Engineer of the Sacramento, California District of the U.S. Army Corps of Engineers.

3.14 Defendant Colonel James L. Lammie, U.S.A., is District Engineer for the San Francisco, California District of the United States Corps of Engineers.

3.15 Defendant Norman B. Livermore, Jr. is the Secretary for Resources of the State of California in which capacity he supervises the operations of the Resources Agency of the State of California.

3.16 Defendant John R. Teerink is the Director of the Department of Water Resources, which is a department within the Resources Agency of the State of California.

3.17 The Sacramento and San Joaquin Rivers and their tributaries combine to drain most of the Central Valley of California, which comprises about 37% of the total land area of the State of California.

3.18 The Sacramento-San Joaquin Delta contains approximately 700 miles of meandering waterways some of which are navigable. Approximately 35% of California warm water and anadramous sport fishing and about 80% of the commercial salmon fishing of California are dependent upon the Delta environment. As used herein, the Sacramento-San Joaquin River Delta ("Delta") shall include all lands within those boundaries set forth in California Water Code §12220 and depicted on State Defendants' Exhibit A.

3.19 The Delta and the marshes and wetlands adjoining the Delta and downstream waters including Suisun Marsh, are a wintering area and a major and customary natural habitat for migratory birds on the Pacific Flyway.

3.20 More than 4,000,000 people reside in the metropolitan San Francisco Bay Area, some of them use and depend in one way or another upon the water of San Francisco Bay for recreation, commerce or aesthetic enjoyment.

3.21 The Legislature of the State of California has authorized the "State Water Project." In 1959 the California Legislature adopted the Burns-Porter Act to provide funds for the project, which would consist of a system of dams, canals, pumping plants and other facilities designed to, among other things, transfer water across the Delta, provide for water conservation and flood and salinity control in the Delta, provide for the generation of power and divert and transfer water from points at or near the Delta to the San Francisco Bay Area, the San Joaquin Valley, the Central Coast and Southern California. The Burns-Porter Act was submitted to and approved by the voters of the State of California on November 8, 1960.

3.22 The following facilities are "joint use facilities" which are used by and for the benefit of both State and Federal projects: the San Luis Dam and Reservoir; the San Luis Forebay (O'Neil Forebay), related dam, and related waste-way; the San Luis Pumping-Generating Plant; the San Luis Canal (California Acqueduct), but not including water service turnouts and check structures and other appurtenances specifically associated with such turnouts; flood retention basins, floodways, outlet channels, wasteways, equalizing reservoirs, check structures, and other structures as necessary for the proper operation and maintenance of the San Luis Canal; the Mile 18 Pumping Plant (Dos Amigos Pumping Plant); and switchyard and related electrical facilities at the San Luis Pumping-Generating Plant and the Mile 18 Pumping Plant, including any necessary transmission facilities between such plants.

3.23 The State of California, through its Resources Agency and Department of Water Resources, has entered into contracts respecting the delivery by it of electrical power and 4.23 million acre feet of water annually by means of the State Water Project. It is contemplated by the State of California and its Department of Water Resources that approximately 4.1 million acre-feet of this water would be transmitted through the Delta Pumping Plant. The primary purchasers of water are the Kern County Water Agency, which has agreed to purchase 1,153,400 acre-feet annually, and the Metropolitan Water District of Southern California, which has entered into contracts for 2,011,500 acre-feet per year. A list of the 31 contractors for water together with the dates and amounts to be delivered is set forth in State Defendants' Exhibit U.

3.24 The State Water Project provides that substantially all of the water required annually by said project will be obtained initially from the Sacramento River and San Joaquin River and their tributaries. Among the facilities completed or partially constructed for this purpose are the Oroville Dam, with a storage capacity of 3,500,000 acre-feet, on the Feather River,

the Delta Pumping Plant which is adjacent to the Delta, and the Clifton-Court Forebay, which is located in the Delta. The location, configuration, and plan of the Delta Pumping Plant including its appurtenant facilities and the Clifton-Court Forebay which, among other things, provide for the diversion of water from the Delta, are accurately depicted in State Defendants Exhibits L through Q.

3.25 The Delta Pumping Plant is located near an artificially created body of water known as Clifton Court Forebay which was created by the California Department of Water Resources by excavating and building dikes inside the existing levees of an area of dry land within the Delta previously known as the Clifton Court Tract. The Clifton Court Forebay became operational in November 1969.

3.26 The United States Bureau of Reclamation is constructing and administers the construction and operation of the Central Valley Project, which consists of a series of reservoirs, pumping plants, canals and other facilities for the purpose of controlling the flow of water in the Sacramento River, San Joaquin River, certain of their tributaries, and the Trinity River, generating hydro-electric power, providing flood control and providing water for irrigation and other uses in the Central Valley of California.

3.27 Included in the facilities of the Central Valley Project is the Tracy Pumping Plant, located on an inlet channel of Old River which is a part of the Delta. One purpose of the Tracy Pumping Plant is to divert water from the Delta by means of pumping into the Delta-Mendota Canal, a 115-mile canal which leads to the Mendota Pool in the Central Valley of California. The location, configuration and plan of the Tracy Pumping Plant and its appurtenant facilities, including those which provide for the diversion of water from the Delta, are accurately depicted in Federal Defendants' Exhibit B.

3.28 The amounts of water (in acre feet) pumped and diverted by the Tracy Pumping Plant during the calendar years 1964 through 1973 are set forth below:

Year	Quantity
1964	1,659,768
1965	1,440,058
1966	1,649,866
1967	1,248,886
1968	2,252,942
1969	1,528,369
1970	1,685,341
1971	2,196,692
1972	2,119,053
1973	2,127,341

3.29 The amounts of water (in acre-feet) pumped and diverted by the Delta Pumping Plant during the calendar years 1967 (the first year of operation) through 1973 are set forth below;

Years	Quantity
1967	21,424
1968	910,061
1969	673,925
1970	544,552
1971	763,621
1972	1,530,666
1973	1,262,120

3.30 Set forth below is a listing of each of the contracts entered into by the State of California for the construction of the Clifton Court Forebay and the Delta Pumping Plant, their appurtenant structures, or any portions or parts thereof together with the dates of said contracts and description of the work performed pursuant to each.

Spec. No.	Description of Work Performed	Began Work	Completed Work
63-22	Intake Channel Sta. 85+00 to 174+40	7/63	10/64
64-09	Delta Pumping Plant & Discharge Lines	8/64	8/66
64-10	Seven Vertical Centrifugal Pumps for Delta Pumping Plant	8/64	6/68
64-48	Five 84-inch and Two 54-inch Pump Discharge Valves for Delta Pumping Plant	5/65	11/69
65-07	Intake Channel Sta. 0+00 to 85+00	5/65	4/67
65-12	Furnish & Install Motors Delta Pumping Plant	5/65	4/69
66-02	Completion Delta Pumping Plant	2/66	2/69
66-06	Fish Protective Facility	5/66	8/68
66-40	Pumping Units-Fish Protective Facility	11/66	6/68
67-45	Clifton Court Forebay	12/67	12/69
67-62	Intake Channel Modifications	10/67	12/67
68-08	Acoustic Velocity Meters in West Canal and Old River	5/68	1/71

3.31 The initial contract for construction of the Tracy Pumping Plant and Intake Channel was dated June 23, 1947. The initial contract for construction of the Delta-Mendota Canal was dated June 14, 1946. Construction of the Tracy Pumping Plant was completed prior to February 1, 1953, on which date it was transferred from the Construction Branch of the Bureau of Reclamation to the Operation and Maintenance Branch. Construction of the Delta-Mendota Canal was completed prior to July 1, 1952, on which date it was transferred from the Construction Branch of the Bureau of Reclamation to the Operation and Maintenance Branch. The initial contract for the construction of the Tracy Fish Facilities was October 27, 1955, and the Facilities were constructed prior to January 1, 1958, the date on which they were transferred to the Operation and Maintenance Branch of the Bureau of Reclamation.

3.32 The State of California proposes to finance, construct and operate a canal approximately 42 miles in length from a point on the Sacramento River near Hood, California, to a point in the delta adjacent to the Tracy Pumping Plant and Delta Pumping Plant. This canal is known as and is referred to herein as the "Peripheral Canal."

3.33 The proposed location, plan and configuration of the Peripheral Canal and its appurtenant facilities are accurately depicted in State Defendants' Exhibits V and W.

3.34 The Peripheral Canal is being designed to transport sufficient quantities of water to both the Delta Pumping Plant and the Tracy Pumping Plant as will satisfy present and future requirements for water to be provided by the State Water Project and Central Valley Project through the California Aqueduct and Delta Mendota Canal, respectively. The Peripheral Canal is also being designed to transport sufficient water to provide water quality control, improve fish and wildlife and recreation potentials in the Delta.

3.35 One of the proposed purposes and functions of the Peripheral Canal is to transport fresh water to the Delta Pumping Plant and Tracy Pumping Plant from a point on the Sacramento River upstream from both the point of salt water intrusion and the point where the poorer quality waters of the San Joaquin River join the Sacramento River thereby insuring that saline or poorer quality water from the Delta does not enter the pumps of the Tracy Pumping Plant or the Delta Pumping Plant. An equally important purpose and function of the Peripheral Canal is to release part of this fresh water through structures along its route into Delta Channels to insure water quality control throughout the Delta for agricultural, fish and wildlife enhancement and other environmental purposes.

3.36 The State of California has expended the following amounts on the Peripheral Canal through 1973:

Year	Planning and Development	Right of Way Acquisition	Right of Way Land Costs
Through 1965	$ 539,726.07		
1966	907,788.14	$ 51,197.62	
1967	970,786.44	51,698.09	
1968	920,029.20	49,731.91	$ 40,918.21
1969	747,939.48	63,061.04	125,707.21
1970	548,081.71	7,954.53	929,010.90
1971	549,435.76	1,715.12	461,251.35
1972	563,713.50	2,230.10	251,343.18
1973	879,656.60	47,904.97	193,492.12
Total Costs	$6,627,156.90	$ 275,493.38	$2,001,722.97
TOTAL OVERALL COST		$8,904,373.25	

3.37 The United States Bureau of Reclamation has directly expended through March 31, 1974 the sum of $751,594.21 in the planning of the Peripheral Canal not including funds allocated for Delta Support Studies, Four Agency Studies or Suisun Marsh Studies.

3.38 The operation of the Tracy Pumping Plant has caused a greater flow of San Joaquin River water into Old River toward the Pumping Plant than occurred under pre-Tracy conditions. During summer periods of low flow in the San Joaquin there can be a net reversal in the flow of the San Joaquin River between San Andreas Landing and Old River.

Operation of Tracy Pumping Plant in conjunction with the Delta Cross Channel also draws water from the Sacramento River on the eastern edge of the Delta to the interior Delta and to the export pumps. The Delta Cross Channel is a facility constructed by the U.S. Bureau of Reclamation to facilitate transfer of water across the Delta.

3.39 The operation of the Delta Pumping Plant has caused net flow reversals during some summer months in the San Joaquin River and most of the year in Old and Middle Rivers. Net flow reversals also occurred at times in the Delta before the Delta and Tracy Pumping Plants were built.

3.42 For purposes of this action, it is stipulated that the following constitute nagivable waters of the United States within the meaning of the Rivers and Harbors Act of 1899: the Sacramento River to River Mile 301.6, at Keswick Dam; the San Joaquin River to River Mile 118, at the confluence of the Merced and San Joaquin River; and the Sacramento-San Joaquin River Delta including but not limited to Old River, Middle River, Italian Slough, Whiskey Slough, Beaver Slough, Disappointment Slough, Fourteen Mile Slough, Victoria Canal, North Victoria Canal, North Canal and Woodwood Canal to the plane of the mean higher-high tide. For purposes of this lawsuit it is agreed that the portion of the Delta from which water is drawn by facilities of the Tracy Pumping Plant is "a navigable river or other navigable water of the United States" within the meaning of section 9 of the Rivers and Harbors Act of 1899.

3.43 No impact statement has been filed pursuant to Section 102 of Environmental Policy Act of 1969 with respect to the Delta Pumping Plant, Tracy Pumping Plant or Peripheral Canal.

3.44 The Peripheral Canal is a "project" having a "significant effect on the environment" within the meaning of § 21100 of the California Environmental Quality Act (CEQA), Pub. Res. Code § 21100 (1970), and the preparation of an adequate Environmental Impact Report by the Department of Water Resources on the Peripheral Canal will therefore be required before construction thereon may commence.

3.45 No environmental impact report has been filed pursuant to CEQA with respect to the Delta Pumping Plant, Peripheral Canal or any portions thereof.

3.46 The Tracy Pumping Plant diverts water from the Delta and the Delta Pumping Plant diverts water from Clifton Court Forebay, which diverts water from the Delta.

3.47 The Peripheral Canal, if constructed, would divert waters from the Sacramento River.

3.48 The Peripheral Canal, as presently planned by the State of California, has been designed so as to permit it to divert from the Sacramento River sufficient quantities of water to satisfy the needs of the Tracy Pumping Plant and the Delta Pumping Plant.

3.49 The operation of the Tracy Pumping Plant and the operation of the Delta Pumping Plant each has the effect of reducing the annual amount of water which, in the absence of such operation, would flow into San Francisco Bay. The dams constructed as part of the Central Valley Project and State Water Project, of which the Tracy Pumping Plant and Delta Pumping Plant are features, store potential flood waters in the winter and spring and release these stored waters during dry periods. These storage releases increase the amount of water which, in the absence of such operation, would be available in the summer and fall and during other dry periods.

3.50 The State of California has acquired a portion of the land required for the construction of the Peripheral Canal.

3.52 The facilities for the diversion of water from the Delta to the Tracy Pumping Plant are accurately depicted in Federal Defendants' Exhibit D.

3.53 The intake structure for the diversion of water from the Delta to the Delta Pumping Plant are accurately depicted in State Defendants' Exhibit L through Q.

3.54 San Francisco Bay and the Delta are estuaries.

3.55 The Peripheral Canal would result in the closure, modification or temporary modification of the following Delta channels: Sacramento River; Snodgrass Slough; Lost Slough; Mokelumne River; Beaver Slough and Beaver Canal; Hog Slough; Sycamore Slough and Sycamore Canal; White Slough and White Canal, and outlet into Disappointment Slough; Telephone Cut; Disappointment Slough, Fourteen Mile Slough and Fourteen Mile Canal; San Joaquin River; Whiskey Slough; Middle River Complex; Old River; and West Canal.

3.56 There has been no Congressional action on the Peripheral Canal and the final Peripheral Canal location and plans have not been approved by the Chief of Engineers or the Secretary of the Army.

3.57 With the completion of related State and Federal projects, the rate of export pumping of Sacramento-San Joaquin River Delta waters by the Tracy and Delta Pumping Plants will increase, under current authorization, from the 3.388 million acre-feet pumped in 1973 to approximately 7 million acre-feet in 1990 and approximately 7.75 million acre-feet by 2020.

* * *

Dated: June 10, 1974

CHARLES B. RENFREW
United States District Judge

The above pre-trial order has been prepared with the assistance of the United States Magistrate and all parties, through their respective counsel, have stipulated to its entry as the pre-trial order of the Court with respect to the first phase of the bifurcated trial of this action.

OWEN E. WOODRUFF, JR.
Owen E. Woodruff, Jr.
United States Magistrate

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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

[Case caption omitted]

AFFIDAVIT OF FRANK M. CLINTON IN SUPPORT OF MOTION TO INTERVENE

FRANK M. CLINTON, being first duly sworn, deposes and says:

I am the General Manager of The Metropolitan Water District of Southern California, hereinafter referred to as "Metropolitan". The boundaries of Metropolitan encompass 125 incorporated cities, as well as large unincorporated areas within the six counties of Ventura, Los Angeles, Orange, Riverside, San Bernardino and San Diego, lying within the Southern California coastal plain. Metropolitan has 27 member public agencies, consisting of 14 cities, 12 municipal water districts and one county water authority; covers an area of some 4,900 square miles; and has a population of more than ten million inhabitants.

On November 4, 1960, Metropolitan entered into a contract, hereinafter referred to as "the contract", with the State of California, acting by and through its Department of Water Resources, hereinafter referred to as "the Department", to purchase up to 1,500,000 acre-feet annually of water from the California State Water Project. On September 28, 1964 and August 4, 1965, Metropolitan and the Department amended the contract to increase Metropolitan's maximum annual entitlement to 2,000,000 acre-feet and then to 2,011,500 acre-feet respectively, to offset Metropolitan's prospective loss of Colorado River water occasioned by the United States Supreme Court Decision in *Arizona* v. *California.*

Under the provisions of the contract, Metropolitan is required to pay the Department substantial sums of money, now estimated to total $6.4 billion over the term of the contract, in return for the Department's delivery of the varying annual amounts of State Project water set forth in the contract. As of this date, Metropolitan has already paid to the Department of Water Resources nearly $300 million pursuant to the contract.

On April 14, 1972, the Department began delivering State Project water to Metropolitan under the contract. Metropolitan has needed those water deliveries in order to help meet the continuing water supply needs of the inhabitants within its boundaries. Metropolitan will need increasing amounts of water from the State Water Project to help meet the estimated future water supply needs of Metropolitan's inhabitants; to offset reductions in Metropolitan's Colorado River supplies as the United States Bureau of Reclamation Central Arizona Project begins to utilize a portion of Metropolitan's current Colorado River water supply; to improve the quality of the total water supply within its boundaries; and to permit development of additional waste water reclamation programs by using the lower salinity of State Project water.

In order to distribute the amounts of State Project water set forth in Metropolitan's State water service contract, Metropolitan has undertaken extensive commitments including a $1.3

billion program initiated in 1965 to construct major water facilities needed to distribute to its inhabitants the State Project water which the Department agreed to deliver to Metropolitan under said contract. Metropolitan's electorate, on June 7, 1966, authorized Metropolitan, by a majority of more than 75 per cent of the votes cast, to incur bonded indebtedness in the amount of $850 million to partially fund that program. Metropolitan has to date issued and sold bonds so authorized totaling $485 million, which must be repaid by property taxes or by revenues generated by water sales or both. In addition Metropolitan has expended some $65 million from its current revenues in that program. Thus, Metropolitan has already expended over $550 million in constructing the initial portions of the facilities needed to distribute the water covered by Metropolitan's State water service contract.

On the basis of the information available to me, it is my belief that an injunction preventing the Department from continuing to operate the Delta Pumping Plant or from constructing or operating the Peripheral Canal would prevent the Department from making the deliveries of State Project water to Metropolitan set forth in the contract; that it would cause financial inequities and economic hardship to Metropolitan and to its inhabitants; that it could prevent Metropolitan from fully meeting the future water needs of its member public agencies and their inhabitants; that it would significantly impair Metropolitan's water service revenue base, and require substantial increases in Metropolitan's water and tax rates; that it could increase the cost of Metropolitan's bond financing by adversely affecting Metropolitan's credit rating and could thus increase substantially the cost to Metropolitan and its inhabitants of selling, issuing and paying presently unsold Metropolitan bonds already authorized, and of constructing additional water resource facilities that will be needed in the future to meet the water needs of Metropolitan's inhabitants; and that these effects could also cause substantial dislocations in other areas of the State because of the commercial, financial and cultural ties between those areas and the area within Metropolitan's boundaries.

In 1964, Metropolitan purchased from the State of California Water Bond R-W249 issued under the California Water Resources Development Bond Act, commonly known and referred to as the Burns-Porter Act. Metropolitan still owns that bond which has a $5,000 principal face value and bears interest at the rate of 3.4 per cent per annum payable semi-annually. Under the terms of the bond, the State's obligation to repay principal falls due on September 1, 1990.

On the basis of the information available to me, it is my belief that an injunction preventing the Department from continuing to operate the Delta Pumping Plant or from constructing or operating the Peripheral Canal could drastically reduce the revenues derived by the State from the sale, delivery or use of water from the State Water Project and could thus remove the principal source of funds available to meet bond interest and principal payment obligations; that the loss of those funds could impair the State's ability to meet its water bond payment obligations and would consequently impair and reduce the value of the aforementioned water bond which Metropolitan owns.

FRANK M. CLINTON

Frank M. Clinton

[Notarization omitted]

Subscribed and sworn to before me this 28th day of March, 1974.

AFFIDAVIT (Brent L. Graham)

JAMES G. MCCAIN
Attorney at Law
1107 Norboe Avenue
Corcoran, California 93212
Telephone: (209) 992-2414

Attorney for Intervenor,
Tulare Lake Basin Water Storage District

IN THE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

[Case caption omitted]

AFFIDAVIT OF BRENT L. GRAHAM IN SUPPORT OF MOTION OF TULARE LAKE BASIN WATER STORAGE DISTRICT TO INTERVENE

BRENT L. GRAHAM, being first duly sworn, deposes and says:

I am the Manager of the TULARE LAKE BASIN WATER STORAGE DISTRICT, a public agency of the State of California, hereinafter referred to as "the District".

The District encompasses a total area of 192,409 acres (300 square miles) in the fertile Tulare Lake bed. Almost 98 percent of the District is in Kings County. The remaining 4,000 acres are in Tulare County.

The District entered into a water supply contract with the State of California, Department of Water Resources, December 20, 1963, following approval of the contract at an election December 17, 1963. This contract, with two later amendments, was validated by judgment in the Superior Court in Kings County, dated March 11, 1965.

The maximum annual entitlement of the District under the State Water Supply Contract as amended will be 110,000 acre-feet.

The water from the California Aqueduct is delivered to District laterals near Kettleman City for transmission to the District.

The District is the second largest agricultural contractor for State Water.

For the years 1974 through 1979 the District expects to receive the following amounts of water pursuant to said Water Supply Contract as amended:

Year	Water Deliveries in Acre Feet
1974	192,125
1975	202,600
1976	202,600
1977	202,600
1978	202,600
1979	202,600

Said water supply is being used and will be used for agricultural purposes and is a vital and essential component of the agricultural economy of Kings County.

Plaintiffs seek to enjoin the State of Caliornia, Department of Water Resources, from operating the Delta Pumping Plant until compliance is had thereby with a multitude of conditions.

The Delta Pumping Plant provides the water for the State Water Project.

The District has financed transmission laterals for the State Water Supply through general obligation bonds in a total amount of $1,800,000. The bonds must be repaid through assessments on real property in the District.

Cessation of water deliveries to the District under the State Water Supply Contract would trigger a disruption of the economy in Kings County, a drastic loss in revenue to the area being farmed and consequent reduction in ability to meet bond payments.

On the basis of information available to me, such State Water Supply Contracts are based on factors unique to the areas represented by the contracting districts and only the district involved can make a full and adequate presentation of the problems peculiar to its area.

Dated: April 12, 1974.

BRENT L. GRAHAM

Brent L. Graham

[Notarization omitted]

AFFIDAVIT (Lloyd C. Fowler)

ALBERT THOMAS HENLEY, General Counsel
5750 Almaden Expressway
San Jose, California 95118
Telephone: (408) 265-2600

DANIEL F. GALLERY
926 Jay Building, Room 505
Sacramento, California 95814
Telephone: (916) 444-2880

Attorneys for Intervenor,
Santa Clara Valley Water District

IN THE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

[Case caption omitted]

AFFIDAVIT OF LLOYD C. FOWLER IN SUPPORT OF MOTION OF SANTA CLARA VALLEY WATER DISTRICT FOR LEAVE TO INTERVENE

LLOYD C. FOWLER, being first duly sworn, deposes and states as follows:

I am the Chief Engineer of Santa Clara Valley Water District, a local agency of the State of California, duly organized and existing under the Santa Clara Valley Water District Act (and hereinafter referred to as "District"); that said District lies adjacent to and generally southerly of the southern arm of San Francisco Bay, having boundaries coterminous with those of the County of Santa Clara, and embracing approximately 853,500 acres;

I have occupied the position of Chief Engineer of the District for in excess of ten years and I have personal knowledge of the matters and things herein set forth.

1. On November 29, 1961, the District entered into a contract for a water supply with the State of California, Department of Water Resources, providing that the State will deliver to the District 100,000 acre-feet of water per annum, from the South Bay Aqueduct of the State Water Project. Such water is pumped by the State from the Sacramento-San Joaquin Delta at the Delta Pumping Plant, into Bethany Reservoir, thence up into the 44-mile South Bay Aqueduct, for delivery to the District (and to portions of Alameda County en route).

2. In 1962, Zone W-1 was formed within the District's boundaries pursuant to said Santa Clara Valley Water District Act, to comprise the service area for the 100,000 acre-feet of the water under the State Water Supply Contract. Said zone comprises substantially all of the Santa Clara Valley (excepting portions south of Metcalf Road), and includes the Cities of San Jose, Santa Clara, Mountain View, Sunnyvale, Palo Alto, Milpitas, Cupertino, Campbell, Los Altos, Town of Los Altos Hills, Monte Sereno, Saratoga, and the Town of Los Gatos, and in addition, several thousand acres of valuable agricultural lands. Said zone and area is hereinafter referred to merely as the "Santa Clara Valley". Said 100,000 acre-feet comprises about one-third of the total water supply within the Santa Clara Valley, the remaining two-thirds being supplied by pumping from the groundwater basin underlying the Santa Clara Valley, from reservoirs on various streams tributary or adjacent thereto, and from other sources. In 1962, the voters within said Santa Clara Valley authorized the District to issue and sell general obligation bonds in the amount of $42,050,000, for the construction of facilities to treat and distribute said water supply from the State to various points therein. All of said bonds were sold and construction of said facilities was thereafter commenced, and is now substantially completed.

3. Deliveries of State Water Project water from the Delta to the District under said water supply contract commenced in 1965, and currently amount to over 92,000 acre-feet per annum. Approximately one-half of said water is treated and delivered to municipal and utility water systems serving inhabitants within Santa Clara Valley, and approximately one-half of said deliveries are infiltrated into the groundwater basin underlying said Santa Clara Valley for groundwater basin recharge.

4. Prior to the importation of such water within the Santa Clara Valley as aforesaid, the cities and utilities serving the urban areas therein, and the agricultural lands therein, had an inadequate supply for their growing needs, and their combined pumping from the groundwater basin underlying the Santa Clara Valley exceeded the safe yield of the basin, and the basin was being overdrafted, at an estimated rate of about 30,000 acre-feet per annum by said pumping. As a further consequence thereof, destruction of and salt water intrusion into the basin from the San Francisco Bay were threatened and lands within the Santa Clara Valley suffered from ground surface subsidence, amounting, near downtown San Jose, to more than thirteen feet. Such subsidence was a direct consequence of overpumping of groundwater in said Valley. These conditions of inadequate supply, overdraft, salt water intrusion, and subsidence were prevented and relieved by said importation of water from the Sacramento-San Joaquin Delta via the South Bay Aqueduct under said water supply contract.

5. If the water supply to the District under said Water Supply Contract were in any way terminated, suspended or curtailed, even on an interim basis, then the inhabitants within said Santa Clara Valley, numbering more than one-million persons, and the agricultural lands therein, would be confronted with a deficient water supply of serious magnitude, and economic and other hardships would result. Further, the aforesaid condition of overdraft would be restored, and substantial and irreversible environmental damage would result, including but not limited to destruction of or damage to the

groundwater basin and the groundwater supply, salt water intrusion into the basin, and additional ground surface subsidence. These conditions would further result in a permanent energy drain, for the pumping of storm water and sanitary sewage against grade, and in the requirement of the extensive levee system to control floods; and further, a permanent energy drain for higher well lifts.

6. Further, the District and the taxpayers within the Santa Clara Valley are and will be required and obligated to pay interest and principal upon the general obligation bonds issued and sold for the construction of the aforesaid treatment and distribution facilities, which payments amount to approximately $2,500,000 annually, and if there were any interruption, suspension or curtailment of said State Water Supply, those facilities would be wasted and useless.

7. Briefly stated, the economy of Santa Clara Valley, without reference to growth, is based upon a given level of water use, about one-third of which is supplied by a diversion made by the State's Delta Pumping Plant and that the only substitute for such importation is groundwater pumping, the result of which will be economic loss and substantial, permanent environmental damage.

LLOYD C. FOWLER

Lloyd C. Fowler

[Notarization omitted]

AFFIDAVIT (Stuart T. Pyle)

EDWARD J. TIEDEMANN
KRONICK, MOSKOVITZ, TIEDEMANN & GIRARD
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Telephone (916) 444-8920

Attorneys for Intervenor

IN THE

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

[Case caption omitted]

AFFIDAVIT OF STUART T. PYLE IN SUPPORT OF MOTION OF KERN COUNTY WATER AGENCY TO INTERVENE

STUART T. PYLE, being first duly sworn, deposes and says:

I am the Engineer-Manager of the Kern County Water Agency, a public agency of the State of California, hereinafter referred to as "the Agency". The Agency boundaries are coterminous with those of Kern County, California.

On November 15, 1963, the Agency entered into a contract with the State of California, Department of Water Resources, to purchase up to 1,000,C00 acre feet of water annually from the California State Water Project. On September 28, 1964, that contract was amended to increase the Agency's maximum annual entitlement to 1,153,400 acre feet. Such water is diverted from the Sacramento-San Joaquin Delta, through the State's Delta Pumping Plant, into the California Aqueduct for delivering to the Agency.

For the years 1974 through 1979, the Agency expects to receive the following amounts of water pursuant to its contract with the State:

Year	Water Deliveries in Acre Feet
1974	669,805
1975	789,652
1976	902,702
1977	922,437
1978	1,003,387
1979	1,046,037

This water will be used primarily for agricultural purposes. Agriculture is California's leading industry and Kern County ranks third of California counties in agricultural production.

In their complaint plaintiffs have requested the court to enjoin the State of California, Department of Water Resources, from operating the Delta Pumping Plant until it has complied with certain conditions. Any court order curtailing or eliminating the delivery of State Project water to the Agency will cause severe economic hardship and social disruption not only to Kern County, but to many areas of California. The water which the Agency purchases from the State is resold to our agricultural member units for distribution and resale to the farmers. These member units have spent and are spending millions of dollars on construction of distribution systems. Those systems have been financed through bonds and loans which must be repaid by property taxes and from revenues generated by water sales. Enjoining the State of California, Department of Water Resources, from pumping water from the Delta Pumping Plant for delivery to the agency, would eliminate these revenues and could result in repayment delinquencies and tax foreclosures on thousands of acres of agricultural land within Kern County. Cessation of water deliveries by the State would also reduce crop production in Kern County which would be detrimental to the economy and the citizens of Kern County, the State and the nation.

An injunction stopping pumping from the Delta Pumping Plants, in addition to working economic hardship, would quite likely result in the filing of claims and possible relating litigation against the State of California for the failure to deliver water to the Agency and its member units as required by contract.

STUART T. PYLE

Stuart T. Pyle

STATE EXHIBIT 8

Figure 5: LONG-TERM WATER SUPPLY

Location No.	Contracting Agency	Total Deliveries through Dec. 31, 1972 (acre-feet)	Maximum Annual Entitlement (acre-feet)
	UPPER FEATHER AREA		
1	City of Yuba City	0	9,600
2	County of Butte	378	27,500
3	Plumas County Flood Control and Water Conservation District	639	2,700
	Subtotal	1,017	39,800
	NORTH BAY AREA		
4	Napa County Flood Control and Water Conservation District	13,687	25,000
5	Solano County Flood Control and Water Conservation District	0	42,000
	Subtotal	13,687	67,000
	SOUTH BAY AREA		
6	Alameda County Flood Control and Water Conservation District, Zone 7	68,403	46,000
7	Alameda County Wate. District	174,397	42,000
8	Santa Clara County Flood Control and Water District	489,205	100,000
	Subtotal	732,005	188,000
	SAN JOAQUIN VALLEY AREA		
9	County of Kings	6,100	4,000
10	Devil's Den Water District	55,486	12,700
11	Dudley Ridge Water District	181,638	57,700
12	Empire West Side Irrigation District	17,761	3,000
13	Hacienda Water District	24,930	8,500
14	Kern County Water Agency	1,324,215	1,153,400
15	Oak Flat Water District	27,389	5,700
16	Tulare Lake Basin Water Storage District	400,549	110,000
	Subtotal	2,038,068	1,355,000

Location No.	Contracting Agency	Total Deliveries through Dec. 31, 1972 (acre-feet)	Maximum Annual Entitlement (acre-feet)
	CENTRAL COASTAL AREA		
17	San Luis Obispo County Flood Control and Water Conservation District	0	25,000
18	Santa Barbara County Flood control and Water Conservation District	0	57,700
	Subtotal	0	82,700
	SOUTHERN CALIFORNIA AREA		
19	Antelope Valley-East Kern Water Agency	53	138,400
20	Castaic Lake Water Agency	0	41,500
21	Coachella Valley County Water District	0	23,100
22	Crestline-Lake Arrowhead Water Agency	464	5,800
23	Desert Water Agency	0	38,100
24	Littlerock Creek Irrigation District	338	2,300
25	Mojave Water Agency	55	50,800
26	Palmdale Irrigation District	0	17,300
27	San Bernardino Valley Municipal Water District	1,275	102,600
28	San Gabriel Valley Municipal Water District	0	28,800
29	San Gorgonio Pass Water Agency	0	17,300
30	The Metropolitan Water District of Southern California	71,938	2,011,500
31	Ventura County Flood Control District	0	20,000
	Subtotal	74,123	2,497,500
	TOTAL STATE WATER PROJECT	2,858,900(g)	4,230,000
	NET AREA TOTAL, STATE WATER PROJECT	2,858,900	4,230,000
	TOTAL, STATE OF CALIFORNIA		
	PERCENT, STATE WATER PROJECT OF TOTAL		

a) Total for Plumas County, including Last Chance Creek Water District.

b) Total for Kings County, including Dudley Ridge Water District, Empire West Side Irrigation District, Hacienda Water District, most of Tulare Lake Basin Water Storage District, and about 40% of Devil's Den Water District.

c) Total for Kern County, including about 60% of Devil's Den Water District, and about 50% of Antelope Valley-East Kern Water Agency.

d) Total for Antelope Valley-East Kern Water Agency includes California City which was reannexed in June, 1972.

e) Includes duplicate values for overlapping agency areas.

PERMIT NO. 4101
(Clifton Court Levee)
DEPARTMENT OF THE ARMY

NOTE.—It is to be understood that this instrument does not give any property rights either in real estate or material, or any exclusive privileges; and that it does not authorize any injury to private property or invasion of private rights, or any infringement of Federal, State, or local laws or regulations, nor does it obviate the necessity of obtaining *State assent* to the work authorized.

PERMIT NO. 4101

Sacramento District
U.S. Army, Corps of Engineers.
650 Capitol Mall,
Sacramento, Calif.
15 June, 1967

State of California
Department of Water Resources
3251 "S" St., P.O. Box 9137
Sacramento, California 95816

Gentlemen:

Referring to written request dated 3 May 1967, I have to inform you that, upon the recommendation of the Chief of Engineers, and under the provisions of Section 10 of the Act of Congress approved March 3, 1899, entitled "An act making appropriations for the construction, repair, and preservation of certain public works on rivers and harbors, and for other purposes," you are hereby authorized by the Secretary of the Army to cut the westerly levee, of West Canal, at Clifton Court Tract for Clifton Court Forebay in Contra Costa County, California, in accordance with the plans shown on the drawing

attached hereto marked: "Proposed Levee Cut, Clifton Court Forebay", dated March 1967, subject to the following conditions:

(a) That this work shall be subject to the supervision and approval of the District Engineer, Corps of Engineers, in charge of the locality, who may temporarily suspend the work at any time, if in his judgment the interests of navigation so require.

(b) That any material dredged in the prosecution of the work herein authorized shall be removed evenly and no large refuse piles, ridges across the bed of the waterway, or deep holes that may have a tendency to cause injury to navigable channels or to the banks of the waterway shall be left. If any pipe, wire, or cable hereby authorized is laid in a trench, the formation of permanent ridges across the bed of the waterway shall be avoided and the back filling shall be so done as not to increase the cost of future dredging for navigation. Any material to be deposited or dumped under this authorization, either in the waterway or on shore above high-water mark, shall be deposited or dumped at the locality shown on the drawing hereto attached, and, if so prescribed thereon, within or behind a good and substantial bulkhead or bulkheads, such as will prevent escape of the material in the waterway. If the material is to be deposited in the harbor of New York, or in its adjacent or tributary waters, or in Long Island Sound, a permit therefor must be previously obtained from the Supervisor of New York Harbor, New York City.

(c) That there shall be no unreasonable interference with navigation by the work herein authorized.

(d) That if inspections or any other operations by the United States are necessary in the interest of navigation, all expenses connected therewith shall be borne by the permittee.

(e) That no attempt shall be made by the permittee or the owner to forbid the full and free use by the public of all navigable waters at or adjacent to the work or structure.

(f) That if future operations by the United States require an alteration in the position of the structure or work herein authorized, or if,in the opinion of the Secretary of the Army, it shall cause unreasonable obstruction to the free navigation of said water, the owner will be required upon due notice from the Secretary of the Army, to remove or alter the structural work or obstructions caused thereby without expense to the United States, so as to render navigation reasonably free, easy, and unobstructed; and if, upon the expiration or revocation of this permit, the structure, fill, excavation, or other modification of the watercourse hereby authorized shall not be completed, the owners shall, without expense to the United States, and to such extent and in such time and manner as the Secretary of the Army may require, remove all or any portion of the uncompleted structure or fill and restore to its former condition the navigable capacity of the watercourse. No claim shall be made against the United States on account of any such removal or alteration.

(g) That the United States shall in no case be liable for any damage or injury to the structure or work herein authorized which may be caused by or result from future operations undertaken by the Government for the conservation or improvement of navigation, or for other purposes, and no claim or right to compensation shall accrue from any such damage.

(h) That if the display of lights and signals on any work hereby authorized is not otherwise provided for by law, such lights and signals as may be prescribed by the U.S. Coast Guard, shall be installed and maintained by and at the expense of the owner.

(i) That the permittee shall notify the said district engineer at what time the work will be commenced, and as far in advance of the time of commencement as the said district engineer may specify, and shall also notify him promptly, in writing, of the commencement of work, suspension of work, if for a period of more than one week, resumption of work, and its completion.

(j) That if the structure or work herein authorized is not completed on or before the 31st day of December, 1970, this permit, if not previously revoked or specifically extended, shall cease and be null and void.

By authority of the Secretary of the Army:

CRAWFORD YOUNG

Crawford Young
Colonel, CE
District Engineer

DEPARTMENT OF THE ARMY
SACRAMENTO DISTRICT, CORPS OF ENGINEERS
650 CAPITAL MALL
SACRAMENTO, CALIFORNIA 95814

IN REPLY REFER TO
SPKKO-N (4101) **12 May 1967**

PUBLIC NOTICE

TO WHOM IT MAY CONCERN:

Application has been made to this office by State of California Department of Water Resources, 3251 S Street, P.O. Box 9137, Sacramento, California 95816, for a Department of the Army permit to cut the westerly levee of West Canal, for the purpose of constructing an inlet control structure for Clifton Court Forebay, Contra Costa County, as shown on the reverse of this notice.

A permit issued by the Department of the Army does not give any property rights either in real estate or material, or any exclusive privileges and does not authorize any injury of private property or invasion of private rights, or any infringement of Federal, State or local laws or regulations, nor does it obviate the necessity of obtaining State assent to the work authorized.

Interested parties are invited to submit in writing, in duplicate, on or before 12 June 1967, any objections they may have to the proposed work. The determination as to whether a permit will be issued must rest primarily upon the effect of the proposed work on navigation. However, other pertinent factors, including fish and wildlife conservation aspects, will be accepted and made part of the record and will be considered in determining whether it would be in the best public interest to grant a permit.

CRAWFORD YOUNG
Colonel, CE
District Engineer

[DIAGRAM OMITTED]

REPORTER'S TRANSCRIPT (partial)

[423] Q. [Mr. Dauber] And you've studied tidal variations in the Delta?

A. [Mr. Herbert] Yes.

Q. What are the tidal variations at—in the Delta at Clifton Court Ferry, which as I understand it is a—is very close to the Tracy Pumping Plant?

A. That's correct.

Oh, the average tidal amplitude is somewhere between three and three and a half feet, from high to low.

THE COURT: And this is Clifton Court Forebay?

THE WITNESS: No. Clifton Court Ferry. It's a station on the Old River near the intake.

* * *

[429] Q. Now, would you define for us what is meant by "reversals of net flow"?

A. Well, it's reversal of an entity net flow, which is the total—or the difference between the total amount of flow upstream minus the total flow downstream during one tidal cycle or any integral number of tidal cycles.

Q. In the Southern Delta, let's say in the Old River, or maybe the San Joaquin River, in the Southern Delta, during a tidal cycle, is there flow in both directions or just in one direction?

A. Normally flow in both directions.

Q. And what's the reason for that?

[430] A. Well, the entire estuary is under the influence of the tidal variation at the Golden Gate.

Q. So it's basically tidal action that causes flow in both directions?

A. Correct.

INTERLOCUTORY ORDER

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

[Case caption omitted]

INTERLOCUTORY ORDER GRANTING INJUNCTIVE RELIEF

The above captioned action came regularly for trial in the United States District Court for the Northern District of California, before the Honorable Charles B. Renfrew, U.S. District Judge, on June 10, 1974. Evidentiary hearings in Phase One of the bifurcated trial were concluded on June 21, 1974, and argument was entertained by the Court on July 26, 1974.

Plaintiffs Sierra Club, Friends of the Earth and Hank Schramm were represented by John B. Clark, Esq., Robert B. Thum, Esq., and Michael R. Sherwood, Esq. Plaintiff William Dixon was represented by Gary J. Near, Esq. The defendants Rogers C. B. Morton, Gilbert G. Stamm, Howard H. Callaway, William C. Gribble, Jr., George B. Fink, Frederick J. Rockwell, and James L. Lammie ("federal defendants") were represented by James L. Browning, Jr., United States Attorney by Richard J. Dauber, Special Assistant to the United States Attorney. The defendants Norman B. Livermore, Jr., and John R. Teerink ("state defendants") were represented by Evelle J. Younger, Attorney General for the State of California by Bertram G. Buzzini, Deputy Attorney General. The intervenor

Kern County Water Agency was represented by Clifford W. Schulz, Esq. The intervenor Metropolitan Water District of Southern California was represented by Robert P. Will, General Counsel and Victor E. Gleason, Deputy General Counsel. The intervenor Santa Clara Valley Water District was represented by Albert Thomas Henley, Esq., and Daniel F. Gallery, Esq. The intervenor Tulare Lake Basin Water Storage District was represented by James G. McCain, Esq.

The Court having heard and considered all of the evidence and arguments thereon, and having issued a Memorandum of Opinion on July 28, 1975, hereby adopts said Memorandum of Opinion as its Findings of Fact and Conclusions of Law, as required by Rule 52(a), Federal Rules of Civil Procedure.

THEREFORE, based upon the Findings of Fact and Conclusions of Law adopted and incorporated by reference herein, it is hereby ORDERED as follows:

1. That state defendants shall obtain authorization to operate the Delta Pumping Plant, in the manner prescribed by section 10, Rivers & Harbors Act of 1899, 33 U.S. Code section 403, at the earliest possible time, but not later than March 31, 1979.

2. That the Secretary of the Interior and the Commissioner of Reclamation shall obtain authorization to operate the Tracy Pumping Plant, in the manner prescribed by section 10, Rivers & Harbors Act of 1899, 33 U.S. Code section 403, at the earliest possible time, but not later than March 31, 1979.

3. That the Secretary of the Army or his delegate shall prepare and file with the Council on Environmental Quality a Final Environmental Impact Statement, pursuant to 42 U.S. Code section 4332, with respect to the issuance of any permits under section 10, Rivers & Harbors Act of 1899, 33 U.S. Code section 403, authorizing the operation of the Delta Pumping Plant or the Tracy Pumping Plant, prior to the issuance of any such permits but not later than December 31, 1978.

4. That with respect to the Peripheral Canal, as presently proposed, no construction work shall be commenced by defendants prior to their obtaining authorization in the manner prescribed by sections 9 and 10, Rivers & Harbors Act of 1899, 33 U.S. Code sections 401, 403.

5. That no authorization under sections 9 and 10, Rivers & Harbors Act of 1899, 33 U.S. Code sections 401, 403 shall be granted respecting the construction and operation of the Peripheral Canal, as presently proposed, without the prior preparation and filing with the Council on Environmental Quality of a Final Environmental Impact Statement pursuant to 42 U.S. Code section 4332 by the Secretary of the Army or his delegate, or by the Secretary of the Interior or his delegate.

6. That no construction work on or relating to the Peripheral Canal, as presently proposed, shall be commenced by state defendants prior to the preparation and filing of a Final Environmental Impact Report pursuant to section 21100, California Public Resources Code.

7. That plaintiffs' second, third and fifth claims are dismissed with prejudice.

8. That pending defendants' compliance with this Interlocutory Order Granting Injunctive Relief, the Court retains jurisdiction over the subject matter and parties to entertain proceedings in Phase Two of the bifurcated trial, and to make such further orders as the Court may deem necessary and just.

DATED: December 18, 1975

CHARLES B. RENFREW

Charles B. Renfrew
United States District Judge

IN THE
SUPREME COURT OF THE UNITED STATES

October Term 1979
No. 79-1252

STATE OF CALIFORNIA, et al.,
Petitioners,
vs.
SIERRA CLUB, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MEMORANDUM OF RESPONDENTS SUPPORTING CERTIORARI

PETTIT & MARTIN
JOHN B. CLARK
JAMES E. HARRINGTON
ROBERT B. THUM
600 Montgomery Street
San Francisco, CA 94111
Telephone: (415) 434-4000

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1979

No. 79-1252

STATE OF CALIFORNIA, et al.,

Petitioners,

vs.

SIERRA CLUB, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MEMORANDUM OF RESPONDENTS SUPPORTING CERTIORARI

Respondents Sierra Club, Hank Schramm and William Dixon hereby inform the Court that they support the granting of a writ of certiorari in this case. The reasons

for respondents' position in this regard are set forth in the Memorandum of Respondents Supporting Certiorari which is being simultaneously filed in the companion case, Kern County Water Agency v. Sierra Club, No. 79-1502.

Dated: April 8, 1980.

Respectfully submitted,

PETTIT & MARTIN
JOHN B. CLARK
JAMES E. HARRINGTON
ROBERT B. THUM

Supreme Court, U. S.
FILED
MAY 6 1980

No. 79-1252 and 79-1502

In the Supreme Court of the United States

OCTOBER TERM, 1979

STATE OF CALIFORNIA, ET AL., PETITIONERS

v.

SIERRA CLUB, ET AL.,

AND

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.

KERN COUNTY WATER AGENCY, ET AL., PETITIONERS

v.

SIERRA CLUB, ET AL.

AND

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1252 and 79-1502

STATE OF CALIFORNIA, ET AL., PETITIONERS

v.

SIERRA CLUB, ET AL.

AND

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5-62)[1] is reported at 610 F. 2d 581. The opinion of the district court (Pet. App. 63-129) is reported at 400 F. Supp. 610.

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[1]All appendix references in this brief refer to the separately bound appendix filed by Kern County Water Agency *et al.* in No. 79-1502.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1979. A petition for rehearing filed by the plaintiffs was denied on January 17, 1980. The petition in No. 79-1252 was filed on February 13, 1980. The petition in No. 79-1502 was filed on March 17, 1980. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a private party may bring an action seeking civil enforcement of Section 10 of the Rivers and Harbors Act of 1899.

2. Whether Section 10 of the Rivers and Harbors Act applies to a state reclamation project that diverts water from a navigable channel where the diversion diminishes the navigable capacity of the channel or where the diversion alters or modifies the course, location, condition, or capacity of the channel.

STATEMENT

1. The California Water Project (CWP) was constructed primarily for the purpose of transporting water from the northern portions of California, where precipitation is comparatively abundant, to the more arid southern half, where most of the State's population and irrigable lands are located. The CWP consists of a series of water storage and transportation works and associated facilities. Among other things, the CWP stores runoff behind dams in the Sacramento River watershed. As those waters are needed, they are released and flow down the Sacramento River to the Delta, a low-lying area of islands and interconnecting channels at the confluence of the Sacramento and San Joaquin Rivers. There, a portion of the released water is pumped out for transportation to the southern regions of the State (Pet. App. 8-9).

The CWP consists of both federal and state components. The federal component is known as the Central Valley Project[2] and is administered by the Secretary of the Interior through the Bureau of Reclamation.[3] The Tracy Pumping Plant, an essential component of the Central Valley Project, lifts waters from the Delta to the northern terminus of the Delta-Mendota Canal, which conveys the waters southwards (Pet. App. 9). The Tracy Pumping Plant began operations in 1951 (Pet. App. 69).

The state component of the CWP is known as the State Water Project (SWP). The SWP includes the Delta Pumping Plant, which pumps water from the Delta for transportation through the California Aqueduct to southern portions of the State. The Delta Pumping Plant commenced operations in 1967 (Pet. App. 9-10, 70).

An additional component of the CWP is in the planning stage. The Peripheral Canal, if constructed, would convey waters taken directly from the Sacramento River around the Delta to a point near the intakes of the two pumping plants. The Peripheral Canal would largely eliminate the diminution in water quality that now occurs when the higher quality waters of the Sacramento River commingle with the waters of the Delta (Pet. App. 71). As planned, the Peripheral Canal would, among other things, result in the closure or modification of a number of rivers and sloughs in the Delta (Pet. App. 92). To date, neither

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[2]The essential operation and features of the Central Valley Project were described by this Court in *Ivanhoe Irrigation Dist.* v. *McCracken*, 357 U.S. 275, 279-287 (1958); and *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 727-730 (1950).

[3]The Bureau of Reclamation was recently renamed the "Water and Power Resources Service," but the term "Bureau of Reclamation" will be used in this brief since that is the term used in the opinions below.

Congress nor the California legislature has authorized construction of the Peripheral Canal.

2. Plaintiffs, two environmental organizations[4] and two individuals, initiated this action against federal and state defendants in 1971 in the United States District Court for the Northern District of California. The complaint alleged that present and proposed future diversions of waters from the Sacramento River and the Delta by means of the Tracy and Delta Pumping Plants and the Peripheral Canal have degraded, and will further degrade, water quality in the Delta and San Francisco Bay, with consequent adverse effects upon wildlife, fisheries, and recreation. Plaintiffs contended that the existing and proposed further diversions violate, or will violate, various statutes including Sections 9 and 10 of the Rivers and Harbors Act of 1899, [hereinafter "the 1899 Act"], 33 U.S.C. 401 and 403, and the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.* Plaintiffs requested the court to enter a judgment declaring that the defendants have not complied with applicable statutes and to enjoin further operation or construction of the water diversion facilities until such time as the defendants comply with the law.

In response to the complaint, the federal defendants contended that the operations of the Tracy Pumping Plant did not violate Sections 9 and 10 of the 1899 Act and NEPA. With regard to the Peripheral Canal, the federal defendants argued that any ruling on this issue would be premature because the Secretary of the Interior had not yet submitted any feasibility report concerning

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[4]The court of appeals subsequently held that one of the environmental organizations lacked standing and directed the district court to dismiss it from this action (Pet. App. 25-26).

the project to Congress and that any such feasibility report would be accompanied by an adequate environmental impact statement (EIS). In its answer, the State of California denied that the operation of its facilities violated any laws. Subsequently, the district court entered orders permitting the Tulare Lake Basin Water Storage District, the Kern County Water Agency, the Metropolitan Water District of Southern California, and the Santa Clara Valley Water District (the Water Agency petitioners) to intervene as defendants.

The district court entered its opinion on July 28, 1975 (Pet. App. 63-129). First, the district court held that private persons are entitled to bring actions seeking to enforce Sections 9 and 10 of the 1899 Act (*id.* at 72-80). Second, the court ruled that the Peripheral Canal, if constructed, will require permits from the Secretary of the Army pursuant to Sections 9 and 10 of the 1899 Act (*id.* at 81-83, 91-93). Third, the court, finding that the pumping of the Tracy and Delta Pumping Plants resulted in a reduction of the navigable capacity of certain waters, ruled that the federal and state defendants had violated Section 10 of t' e 1899 Act by failing to obtain permits for such diversions from the Secretary of the Army (*id.* at 83-104). Finally, the court held that any Section 9 or 10 permit issued by the Secretary of the Army must be preceded by an adequate EIS (*id.* at 108-121). Plaintiffs' remaining causes of action were dismissed (*id.* at 129).

An order granting injunctive relief was entered on December 18, 1975. The order directed the federal and state defendants to obtain Section 10 authorization to operate the Tracy and Delta Pumping Plants and required

that any such permit be preceded by an EIS (Pet. App. 6).[5] The court further directed that no work on the Peripheral Canal may be commenced until Section 9 and 10 permits are obtained and that any such permits must be preceded by an EIS (*ibid.*). All of the defendants appealed from this order.[6]

3. The court of appeals (Pet. App. 5-62) affirmed in part and reversed in part. First, the court of appeals agreed (*id.* at 22) that "private parties who suffer special injuries because of unauthorized activities affecting the navigable capacity of our Nation's waters may sue to enforce the permit requirements of [S]ection 10." Second, the court of appeals affirmed the ultimate holding of the district court that Section 10 applied to the pumping operations at issue, but it did not base the holding on the district court's findings that the operations produced obstructions to the navigable capacity of certain rivers, in violation of the first and third clauses of Section 10. Rather, it concluded that the finding that the pumping operations altered the condition of the rivers was sufficient to bring those operations within the third clause of Section 10, which makes it unlawful, without authorization from the Secretary of the Army, "to excavate or fill, or in any manner to alter or modify the

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[5]We are advised by the Sacramento District of the Corps of Engineers that, although the State takes the position that Section 10 does not apply to its Delta Pumping Plant, the State, as a precautionary measure, filed an application for a Section 10 permit on October 21, 1975. The Corps has been processing the application and working with the State on the requisite EIS since that date. If the permit is to be granted, it will be granted no later than December 1, 1980, according to the present schedule.

[6]None of the appellants attacked the district court's holdings with respect to the Peripheral Canal.

course, location, condition, or capacity of * * * the channel of any navigable water of the United States * * *." The court of appeals reversed the district court with respect to the federal Tracy pumping facilities (Pet. App. 39-49), finding that those works had been affirmatively authorized by Congress and were thus exempt from the requirements of Section 10. The court of appeals agreed (*id.* at 50-52), however, that a Section 10 permit issued for a particular component of the State facilities did not authorize the facilities in their entirety and that an FPC license for portions of the California Water Project did not exempt those facilities from Section 10 requirements. Finally, noting that current regulations of the Army Corps of Engineers exempted structures completed before December 18, 1968, from the permit requirement where the works do not interfere with navigation, the court (Pet. App. 53-54) remanded the case to the district court for a determination whether the State's facilities are exempt under the regulation and, if so, whether such regulatory exemptions are permissible under the 1899 Act.

DISCUSSION

1. The Water Agency petitioners correctly point out (Kern Pet. 20-24) that the circuits are divided on the question whether the Rivers and Harbors Act of 1899 may be enforced by private parties.[7] We agree with

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[7]As the Water Agency petitioners note (Kern Pet. 22-23), the court of appeals suggested (Pet. App. 11 n. 6) that the Third Circuit decision in *Red Star Towing & Transportation Co.* v. *Dept. of Transportation of New Jersey*, 423 F. 2d 104 (3d Cir. 1970), was distinguishable because it rested on the State's Eleventh Amendment immunity against suits in admiralty. In a recent decision, *National Sea Clammers Ass'n* v. *City of New York*, No. 79-1360 (Feb. 5, 1980), the Third Circuit has, however, expressly ruled (slip op. 21) that enforcement of Section 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. 407 (the Refuse Act), "is limited to actions by the United

petitioners that the court of appeals erred in concluding that petitioners enjoyed an implied right of action under the 1899 Act; and we join them in urging this Court to review that question, in light of the number of circuits in which cases posing this issue have now arisen, and the potential for interference with the administration of the Act by the Army Corps of Engineers (the body to which the Secretary of the Army has delegated his permit-granting authority).

In finding that a private right of action could be implied from the 1899 Act, the court of appeals misapplied factors this Court has specified as relevant to that determination (*Cort* v. *Ash*, 422 U.S. 66, 78 (1975)). Noting that Section 10 of the Rivers and Harbors Appropriations Act of 1890, ch. 907, 26 Stat. 426, 454, was enacted in response to *Willamette Iron Bridge Co.* v. *Hatch*, 125 U.S. 1 (1888), a case in which private parties were denied a federal court injunction to enjoin construction of a bridge over a navigable water because such obstructions were not prohibited by federal law, the court of appeals concluded that private parties suffering injury from such obstructions must have been intended beneficiaries under the 1890 Act and its successor, the 1899 Act. The disturbing aspect of *Willamette*, however, was the clear implication that, because the Court recognized no general "common law of the United States [prohibiting] obstructions and nuisances in navigable rivers" (125 U.S. at 8), even federal authorities could not prevent or compel the removal of obstacles to navigation. See 125 U.S. at 9. As this Court later observed, the 1899

States Attorneys," and it characterized *Red Star Towing* as a decision that rejects the contention that a private remedy should be implied whenever a United States attorney is involved as counsel for federal defendants.

Act asserted the "sovereign power of the United States" and the government is "a principal beneficiary of the Act, if not the principal beneficiary." *Wyandotte Transportation Co.* v. *United States*, 389 U.S. 191, 201 (1967). Although the debate on the 1890 Act indicates that Congress was aware that individual groups of citizens had on rare occasions attempted, usually without success, to enjoin obstructions, and were unable to obtain the aid of federal authorities because those authorities had no law under which to proceed (21 Cong. Rec. 8603 (1890) (remarks of Senator Vest)), there is no suggestion that either the 1890 or the 1899 Act was focussed on protecting the rights of a class of citizens as is, for example, the Voting Rights Act of 1965, 42 U.S.C. 1973. Cf. *Allen* v. *State Board of Elections*, 393 U.S. 544, 557 (1969).

Examining the legislative history of the 1899 Act, the court of appeals found no reflection of "congressional intent either to afford a private remedy or to deny one" (Pet. App. 15), and it discounted the express language of the Act's enforcement provisions, including Section 17, 33 U.S.C. 413, which provides that "the Department of Justice shall conduct *the* legal proceedings necessary to enforce" the prohibitory provisions of the Act (emphasis added). The court's treatment of that language conflicts with this Court's approach in *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412, 413-419 (1975); *National Railroad Passenger Corp.* v. *National Ass'n of Railroad Passengers*, 414 U.S. 453, 458 (1974). See also *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 571 (1979).

The third factor identified by this Court in *Cort* v. *Ash*, *supra*—whether implying a private right of action is consistent with the underlying legislative scheme—also weighs against implying such a remedy. As the Second

Circuit has accurately observed with respect to enforcing the Act's prohibitions of discharges, the "clear congressional purpose" to concentrate enforcement in the Department of Justice could be subverted if a "careful federal decision not to seek an injunction because of some general policy or in view of [some] other means of ending or alleviating the discharge, could be upset by any individual who thought he understood better the needs of the public." *Connecticut Action Now, Inc.* v. *Roberts Plating Co.*, 457 F. 2d 81, 89 (1972). That in some cases the federal government might ultimately agree with private plaintiffs in such suits that some activity affected a navigable water in such way as to require abatement or monitoring under the 1899 Act does not refute this proposition.

The fourth factor, whether the cause of action is one which has traditionally been relegated to state law, may cut both ways. But, on the basis of the first two factors alone, properly applied, the court of appeals should have concluded that no private right of action may be implied under the 1899 Act. *Touche Ross & Co.* v. *Redington*, *supra*, 442 U.S. at 576.

2. The court of appeals held (Pet. App. 27-28, 39) that, because it was shown that the operation of the Delta Pumping Plant lowered the water level of a navigable stream, Section 10 of the 1899 Act requires authorization by the Corps of Engineers regardless of whether there is any additional showing that this alteration of condition amounted to an obstruction of navigable capacity. Petitioners (State Pet. 11-14; Kern Pet. 25-31) assert that this construction of Section 10 of the 1899 Act is overbroad.

Petitioners could be correct in contending that Section 10 does not require permits from the Corps of Engineers as to every alteration in the condition of a navigable stream, regardless of effects on navigable capacity.[8] Nevertheless, on the present record, this case is not an appropriate vehicle for reviewing that question. The district court found that both the State's Delta Pumping Plant and the federal Tracy Pumping Plant obstructed navigable capacity through lowering water levels and producing net flow reversals in navigable waters and thus came within the first and third clauses of Section 10 (Pet. App. 92-93). Although the court of appeals "decline[d] to adopt the District Court's approach" (Pet. App. 27), it did not reverse the district court's findings with respect to effects on navigable capacity. Hence, the court of appeals'

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[8]The Corps of Engineers does not claim such broad jurisdiction for its permit program. Where, as in the present case, the effects on navigable waters at issue are produced by structures or work not themselves located within a navigable water of the United States, a Section 10 permit is required only if the structures or work "affect the course, location, or condition of the waterbody in such a manner as to impact on the navigable capacity of the waterbody." 33 C.F.R. 322.3(a)(1) (1979).

decision with respect to Section 10 coverage may well be sustainable on a ground other than its broad construction of that provision. Clearly, the fact-bound question whether the evidence supports the district court's findings respecting obstruction of navigable capacity is not appropriate for review by this Court.

Other contentions made by petitioners in attacking the court of appeals' conclusion that Section 10 permit requirements apply to the Delta pumping operation do not respond only to the broad construction given Section 10 by the court of appeals, but would, if upheld, take certain State operations out of the ambit of Section 10, even where an obstruction of navigable capacity was shown. In particular, petitioners suggest (State Pet. 8; Kern Pet. 27-29) that an actual interference with navigation must be shown before a work or structure can be found to come within the third clause of Section 10. They also argue that Section 10 does not apply to diversions of water that are part of a state water allocation scheme (State Pet. 14-22) but that, if it does apply, a special limiting construction is required (Kern Pet. 31-36). The court of appeals' rejection of these contentions is correct and does not conflict with decisions of this Court or of any other court of appeals, so review of these questions is equally unwarranted.

a. Nothing in the language of Section 10 suggests that actual impairments of navigation must be shown before a permit may be required.[9] The plain language of Clause 3

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[9]The State petitioners incorrectly suggest (State Pet. 10-11) that the federal respondents agreed in the court below that this is the proper test, at least where state water allocations are concerned, and they

of Section 10 makes the permit requirement applicable to any alteration of the "capacity" of a navigable stream, and the "broader" prohibition of obstructions to navigable capacity in the first clause reinforces the prohibition against unauthorized alterations of navigable capacity in Clause 3. *United States* v. *Republic Steel Corp.*, 362 U.S. 482, 486 (1960).[10] Although, as petitioners point out

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quote out of context language from the federal respondents' reply brief. The complete passage from the reply brief states (Br. 6-7 n.3):

> Thus, we disagree with California and the intervenors to the extent that they suggest that Section 10 comes into effect only in cases involving obstructions to actual present traffic on navigable waters. The proper focus of inquiry is whether the activity in question affects navigable capacity rather than its impact on actual navigation. *Weiszmann* v. *Dist. Eng., U.S. Army Corps of Eng.*, 526 F. 2d 1305 (C.A. 5, 1976); *United States* v. *Diamond*, 512 F. 2d 157, 160 (C.A. 5, 1975), cert. denied, 423 U.S. 923; *United States* v. *Joseph G. Morett, Inc.*, 478 F. 2d 428-429 (C.A. 5, 1973); cf. *United States* v. *Sunset Cove, Inc.*, 514 F. 2d 1089 (C.A. 9, 1975). Applicable Corps of Engineers' regulations require a Corps' permit for structures or work physically outside of navigable waters" * * * if these structures or work affect the course, location, or condition of the waterbody in such a manner as to significantly impact on the navigable capacity of the waterbody." 33 C.F.R. sec. 209.120(e)(i).
>
> We do not mean to imply, however, that by promulgating these regulations the Secretary of the Army intends to take over traditional state administration of appropriative water rights—a task far beyond both Congress' intent in enacting Section 10 and the Corps of Engineers' present capabilities. Perhaps needless to state, the delicate balance between federal control over navigable waters and state authority over traditional appropriate water rights may well be upset should private rights of action to enforce Section 10 be allowed.

[10]The Water Agency petitioners' argument (Kern Pet. 27) that the use of the term "channel" in the third clause of Section 10 makes that clause applicable only to alterations in "the physical bed of a stream, bay, or sound" as opposed to alterations in the "waters which it encloses" is without merit. If "channel" as used in that clause meant

(State Pet. 26; Kern Pet. 29), the record showed such an interference resulting from the water diversion concerned in *Wisconsin* v. *Illinois*, 278 U.S. 367 (1929) and *Sanitary District of Chicago* v. *United States*, 266 U.S. 405 (1925), this Court nowhere indicated in those decisions that interference with navigation was the only test. Similarly, the Water Agency petitioners are incorrect in contending (Kern Pet. 30-31) that a decision affirmed by the Third Circuit, *United States* v. *Bigan*, 170 F. Supp. 219 (W.D. Pa. 1959), aff'd, 274 F. 2d 729 (3d Cir. 1960), conflicts with the decision of the court below on this point. Both the district court and the court of appeals in *Bigan* held only that where the federal government invokes its authority, independent of statute, to enjoin obstructions of navigation or direct interferences with the flow of commerce, it must show an actual interference with navigation. 170 F. Supp. at 225-226; 274 F. 2d at 732-733.

b. There is no merit to petitioners' contentions that Section 10 does not apply to water diversions by facilities owned and operated by a state—or that if Section 10 does apply to such diversions, a special limiting construction is required. The argument is effectively refuted by *Sanitary District of Chicago* v. *United States*, *supra*, in which this Court held that a corporation organized under an Illinois statute to provide for public sanitation in a portion of Northern Illinois (266 U.S. at 424) was prohibited by Section 10 of the 1899 Act from making unauthorized

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nothing more than the physical bed of a body of water, the reference in the clause to a "course" would make little sense. Waters, not streambeds, are properly described as having a course. In any event, *Oklahoma* v. *Texas*, 258 U.S. 574 (1922), the decision from which these petitioners derive this definition, identifies the "middle of the main channel" of a navigable stream with "the thread of the navigable current." 258 U.S. at 593.

diversions from Lake Michigan for public sanitation purposes. The Court nowhere suggested that Section 10 had only limited application to such diversions for public purposes. Indeed, in *Wisconsin* v. *Illinois*, *supra*, a subsequent case concerned with the same diversions, the Court noted that the Secretary of War, charged with administering Section 10, was obligated to use his permit-granting authority so as "to maintain the navigable capacity of Lake Michigan," and could not grant a permit simply to aid the public body in providing for sewage disposal (278 U.S. at 417-418).

Petitioners' position is not advanced by their reliance (State Pet. 14-19; Kern Pet. 31-36) on other statutes affecting state water allocation, in which Congress has expressed an intent not to interfere with state authority in such matters, or on decisions of this Court recognizing state authority over intrastate waters. Those statutory provisions reflect only the limitations of federal jurisdiction based on the statutes in which they appear and cannot serve as the basis for exemptions to the 1899 Act. Moreover, as this Court explained in *California* v. *United States*, 438 U.S. 645 (1978), a case heavily relied on by petitioners, a state's authority over its internal waters does not permit it to disturb the navigability of rivers. 438 U.S. at 662, citing *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 709 (1899).[11]

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[11]The State petitioners (Pet. 22-24) advance an additional argument, not made in the court below, that Section 10 may not be enforced against a state because the first sentence of Section 12 of the 1899 Act, 33 U.S.C. 406 (Pet. App. 2-3), which deals with penalties for violations of Section 9, 10, and 11 of the Act, refers to "[e]very person and every corporation" and does not expressly include states. That sentence, however, concerns only criminal penalties. The second sentence of Section 12, which authorizes the Attorney General to seek

4. The Water Agency petitioners contend (Kern Pet. 36-37) that the Delta Pumping Plant was authorized by a Section 10 permit granted by the Corps for construction of the Clifton Court Forebay, an intake facility for the plant. The court of appeals found (Pet. App. 50-51) that the permit did not by its terms authorize the pumping operation and that the material submitted in support of permit application did not even directly refer to the pumping plant. Accordingly, it agreed with the district court that the permit for this one structure could not be considered authorization for the entire pumping plant. The conclusion is correct, and, in any event, the agreement of two courts on such a fact-bound issue does not raise a question appropriate for review in this Court. *Berenyi* v. *Immigration Director*, 385 U.S. 630, 635 (1967).

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civil injunctions, contains no language arguably limiting enforcement to a specific class of violators. In addition, the remedies that the government may seek under the 1899 Act are not limited to those specified in Section 12. *Wyandotte Transportation Co.* v. *United States*, *supra*, 389 U.S. at 202-203; *United States* v. *Republic Steel Corp.*, *supra*, 362 U.S. at 491-492.

CONCLUSION

The petition for a writ of certiorari in No. 79-1252 should be denied. The petition in No. 79-1502 should be granted, but limited to the question whether the Rivers and Harbors Act of 1899 may be enforced by private suit.

Respectfully submitted.

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MAY 1980

DOJ-1980-05

FILED
SEP 27 1980
, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

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Respondents.

BRIEF OF AMICI CURIAE STATES OF ARIZONA, COLORADO, IDAHO, KANSAS, MONTANA, NEBRASKA, NEVADA, NEW MEXICO, NORTH DAKOTA, OKLAHOMA, OREGON, SOUTH DAKOTA, UTAH, WASHINGTON, AND WYOMING IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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IN THE

Supreme Court of the United States

STATE OF CALIFORNIA, *et al.*,
Petitioners,

v.

SIERRA CLUB, *et al.*,
Respondents.

BRIEF OF *AMICI CURIAE* IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

BRIEF OF *AMICI CURIAE* STATES OF ARIZONA, COLORADO, IDAHO, KANSAS, MONTANA, NEBRASKA, NEVADA, NEW MEXICO, NORTH DAKOTA, OKLAHOMA, OREGON, SOUTH DAKOTA, UTAH, WASHINGTON, AND WYOMING

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INTEREST OF *AMICI*

The western states named herein as *amici curiae* all have comprehensive systems for the allocation and administration of water. Transformation of the West into an economically productive and socially inhabitable region has been due in significant part to the security afforded by water rights granted under state administrative and judicial procedures.

At an early stage in the development of western water law, indeed before many of the western states had been admitted into the Union, Congress deferred to local law. This Court in *Broder* v. *Natoma Water and Min. Co.,* 101 U.S. 274 (1880), observed that local appropriation rights were "rights which the government had, by its conduct, recognized and encouraged and was bound to protect." *Id.* at 276.

This congressional deference to state water law in the reclamation of the arid western lands has continued, and indeed, was strongly reaffirmed by this Court in its recent decision in *California* v. *United States,* 438 U.S. 645 (1978). There the Court stated:

> "The history of the relationship between the federal government and the states in the reclamation of the arid lands of the western states is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress." *Id.* at 653.

The Court went on to hold that the Secretary of Interior was bound by the Reclamation Act of 1902 to acquire water rights for a federal reclamation project from the State of California, and that further, California could impose any condition in that permit which was not inconsistent with clear congressional directives regarding the project.

In laying the background for its decision, the Court in *California* referred to its earlier decisions in *United States* v. *Rio Grande Dam and Irrig. Co.,* 174 U.S. 690 (1899), and *Kansas* v. *Colorado,* 206 U.S. 46 (1906). The Court discussed the *Rio Grande* case as follows:

> "In *United States* v. *Rio Grande Dam and Irrig. Co.,*. . . [t]he Court noted that there are two limitations to the States' exclusive control of its streams—reserved rights 'so far at least as may be necessary for the beneficial uses of the government property' and the navigation servitude. The Court, however, was careful to emphasize with respect to these limitations on the states' power that, except where the reserved rights or navigation servitude of the United States are invoked, the state has total authority over its internal waters. *'Unquestionably the state. . .has a right to appropriate its waters, and the United States may not question that appropriation, unless thereby the navigability of the* [*river*] *be disturbed.'* " 438 U.S. at 662. (emphasis added)

The Court cited *Kansas* v. *Colorado* for additional evidence of congressional deference to state water laws:

> "Similarly, in *Kansas* v. *Colorado,* 206 U.S. 46 (1906), the United States claimed that it had a right in the Arkansas River superior to that of Kansas and Colorado stemming from its power 'to control the whole system of the reclamation of arid lands.' The Court disagreed and held that state reclamation law must prevail. . .federal legislation could not 'override state laws in respect to the general subject of reclamation.' " 438 U.S. at 663.

The Court in *Kansas* v. *Colorado* reiterated its earlier conclusions in the *Rio Grande* case recognizing the only two limitations on exclusive state jurisdiction over its waters, namely

that of reserved rights, and the "power of the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States." 206 U.S. at 86.

The lower court has either disregarded or misread the long line of decisions by this Court, most recently reaffirmed in *California* v. *United States,* recognizing the primacy of state laws for the appropriation of waters. The Ninth Circuit court has determined that the Corps of Engineers may require a permit under Section 10 of the Rivers and Harbors Act for state authorized diversions for reclamation purposes, on the basis that such diversions amount "to an alteration or modification of the condition or capacity of [the] waters." This result follows, according to the Ninth Circuit, without regard to the effect of the diversions on actual navigable capacity. Such a decision could have seriously adverse consequences for administration of state water rights in the western states.

The Ninth Circuit's rationale apparently applies to any diversion which would ultimately have some effect on the condition or flow of a navigable stream or lake. According to the Ninth Circuit, such an effect is "presumed" to constitute an obstruction to navigation for purposes of Section 10, and thus a Section 10 permit is required. It would follow that any diversion for consumptive use from a navigable stream or lake, and from any of its tributaries or upper reaches, would come within the purview of Section 10, regardless of the effect of the diversion on navigable capacity.

The right to initiate an appropriation by a diversion for beneficial use is protected under the constitutions of several of the western states. *E.g.* Colo. Const., Art XVI. §§ 5 and 6; D. Harrison and C. Woodruff, *Accommodations of the Appropriation Doctrine and Federal Goals Under Sections 208 and 404 of Public Law 92-500 and Section 10 of the Rivers and Harbors Act of 1899,* 22 Rocky Mtn. Min. L. Inst. 941 (1976). Once water has been diverted and applied to beneficial use, an appropriation is complete giving rise to a water right recognized as a vested property right. *Id.* at 978-79. The denial of a

Section 10 permit would thus prevent the accomplishment of an essential prerequisite to the appropriation of water. *Id.* At the least, it would present significant delay, inconvenience and expense to water users, if Corps regulations were imposed with respect to work in connection with water diversions and impoundments and related structures.

The potential adverse impacts of the Ninth Circuit's decision are compounded by the fact that the diversions in question first took place several years prior to the initiation of this litigation. If the Ninth Circuit's decision were followed, it would mean that numerous state water right holders in the West would be faced with the possibility that the diversions on which they have relied for their farms, orchards, and businesses could be subjected to Section 10 jurisdiction, with the result that the diversions could be denied or limited on the basis of "public interest" criteria which did not exist at the time the diversions were initiated. Even in the absence of any demonstrated affect on navigation, there would be no guarantee of compensation for injury to private property rights. Based on the rationale of the Ninth Circuit, the government could argue that assertion of Section 10 jurisdiction was a legitimate exercise of regulatory authority under the Commerce Clause, and therefore no compensation was required.

In appropriation states the property right which arises when water is appropriated generally includes the right to change the point of diversion or place of use of water, provided no injury to other water rights results. *See id.* For a variety of reasons, it may become necessary to change the location or means of the diversion. Thus, an existing structure may need to be moved to a different location or extended further into the stream. Since Corps regulations do not exempt such work, a permit may be required under Section 10. Permit denial under such circumstances would deprive the water right holder of his ability to continue to divert and use the water he has lawfully appropriated. *Id.*

Another serious problem is the potential impact of the Corps permit program on pending projects which are dependent on the continued validity of "conditional" water rights acquired under state law. A conditional water right is obtained through action by the claimant evidencing his intent to appropriate water for beneficial use. Once this prerequisite has been satisfied, if the appropriation is completed with "reasonable diligence," the water right becomes "absolute" and its priority date relates back to the date on which the claimant's intent to appropriate was evidenced. *E.g., Maricopa County M.W.C. Dist.* v. *Southwest Cotton Co.,* 39 Ariz. 65, 4 P.2d 369 (1931); *Morgan* v. *Shaw,* 47 Ore. 333, 83 P.534 (1906); *Moyer* v. *Preston,* 6 Wyo. 308, 44 P.845 (1896); R. Dewsnup and D. Jensen, *A Summary Digest of State Water Laws* 31-32 (1973). Like water rights based on completed appropriations, conditional water rights are considered to be vested property rights. *See e.g. Sieber* v. *Frink,* 7 Colo. 148, 2 P.901 (1883); R. Dewsnup and D. Jensen, *supra* at 31.

The conditional decree concept was developed in recognition of the fact that a water diversion project requiring a large investment over a considerable period of time could not be justified without assurance that upon completion the priority date of the water right upon which the project depended would relate back to the date when the project commenced. There are numerous projects throughout the West which rely on conditional water rights. D. Harrison and C. Woodruff, *supra,* at 980. If the rationale of the Ninth Circuit is accepted and Section 10 jurisdiction thus expanded, many of these conditional water rights would be threatened with the possibility that a permit for the construction of the diversion or impoundment structure essential for its water supply will be denied. *See id.*

The broad "public interest" criteria now incorporated in the Corps regulations for evaluation of permit applications under Section 10 also raise the question of the potential for Corps consideration of issues involving water rights arising under state law in the process of reviewing a permit application.

There exists the possibility of the inclusion of Corps conditions in a permit designed to assure that water rights owned or claimed by others would not be adversely affected. Interstate water matters, such as the interpretation of interstate compacts or Supreme Court decrees could also be included in the broad review of the public interest mandated by Corps regulations. *See id.*

That Congress intended no such results in enacting Section 10 of the Rivers and Harbors Act is clear from the language of the Act, its traditional administrative interpretation, and most importantly, the decisions of this Court. For this reason, and because of the potentially serious adverse consequences of the Ninth Circuit's decision, we urge this Court to grant the State of California's petition.

QUESTIONS PRESENTED

Although the lower court's decision involves several other questions, this brief is confined to the following issues:

1. The Corps of Engineers does not have jurisdiction under Section 10 of the Rivers and Harbors Act of 1899 with respect to activities which neither obstruct navigation or adversely affect navigable capacity.

2. Assuming *arguendo,* that Section 10 jurisdiction extends to some activities without regard to their impact on navigation, in the absence of any showing of adverse impact on navigable capacity, the Corps of Engineers does not have jurisdiction under Section 10 to require a permit for a state authorized water diversion.

3. The Corps of Engineers does not have jurisdiction to require a Section 10 permit for a state authorized diversion in connection with a federal reclamation project authorized under the 1902 Reclamation Act, so long as the state authorization is not inconsistent with clear congressional directives concerning the project.

REASONS FOR GRANTING THE WRIT

The *amici* urge the Court to review the Ninth Circuit's decision, because that decision is in clear conflict with the applicable decisions of this Court.

A. Jurisdiction Under Section 10 of the Rivers and Harbors Act of 1899.

In the case of *United States* v. *Rio Grande Dam and Irrig. Co.*, 174 U.S. 690 (1899), this Court construed the almost identical predecessor to Section 10. The issue was whether the Act conferred jurisdictions to prohibit a dam on the Rio Grande River at a site in New Mexico where the river was not navigable, on the basis that by diverting most of the flow of the river, the dam would interfere with its navigable capacity downstream. The Court stated:

> "It is not a prohibition of any obstruction to the navigation, but any obstruction to the navigable capacity, and anything, wherever done or however done, within the limits of the jurisdiction of the U.S. which tends to destroy the navigable capacity of one of the navigable waters of the U.S., is within the terms of the prohibition. . . . *The question always is one of fact, whether such* [*obstruction*] *substantially interferes with the navigable capacity within the limits where navigation is a recognized fact.*" *Id.* at 708. (emphasis added)

That the sole basis for asserting jurisdiction under Section 10 is the protection of navigation on the nation's waterways was reaffirmed in *Kansas* v. *Colorado,* 206 U.S. 46 (1906). The Court quoted at length from its earlier decision in *Rio Grande* and then stated:

> "It follows from this that if, in the present case, the national government was asserting, as against either Kansas or Colorado, that the appropriation for

> the purposes of irrigation of the waters of the Arkansas was affecting the navigability of the stream, it would become our duty to determine the truth of the charge. But the government makes no such contention. On the contrary, it. . . nowhere claims that any appropriation of the waters by Kansas or Colorado affects its navigability." *Id.* at 86.

This view of the jurisdictional scope of Section 10 was again reiterated by this Court in *Wisconsin* v. *Illinois,* 278 U.S. 367 (1929):

> "The true intent of the Act of Congress was that unreasonable obstructions to navigation and navigable capacity were to be prohibited, and in the cases described in the second and third clauses of Section 10, the Secretary of War, acting on the recommendation of the Chief of Engineers, was authorized to determine what in the particular cases constituted an unreasonable obstruction." 278 U.S. at 413.

From these cases, it should be clear that unless the structure or work would create some kind of obstruction to navigation or navigable capacity, the Army Corps of Engineers has no authority under Section 10 to require a permit.

The Corps of Engineers has traditionally administered Section 10 consistently with this premise, so that the primary consideration in determining whether a permit should be issued has been whether the proposed structure or activity would adversely affect navigable capacity. D. Harrison and C. Woodruff, *supra* at 966.

The Attorney General expressed the following opinion in 1925 concerning the function of the War Department in relation to the purposes of the Act:

> "Unquestionably the War Department must take into account, in exercising its administrative discretion, the policy of Congress as disclosed by the

> statute. The function of the Department is to determine the facts and not the policies. In doing so you must be guided by the clear intention of Congress that navigable waters shall not be so diverted for local purposes as to injure the just rights of the whole people in the navigability of such waters." 34 Op. U.S. Att'y Gen. 410, 417-18 (1925).

Present Corps of Engineers regulations published in 1977 are particularly relevant in this case, since both the Tracy and Delta pumping plant diversions in question are "approximately two miles from navigable water." *Sierra Club* v. *Morton,* 400 F. Supp. 610 (N.D. Cal. 1975). The regulations provide in part:

> "(a) (1) Structures or work are in the navigable waters of the United States if they are within limits defined in 33 CFR part 329. Structures or work outside these limits are subject to the provisions of law cited in paragraph (a) above, if these structures or work affect the course, location, or condition of the water body *in such a manner as to impact on the navigable capacity of the water body.* . . . 33 C.F.R. § 322.3.

Supplementary information accompanying the regulations explained as follows:

> ". . . . [A]ny work that is performed outside the limits of a navigable water which affects its navigable capacity may also require a Section 10 permit. *The 1899 Act was enacted to protect navigation and the navigable capacity of the nation's waters".* 42 Fed. Reg. 37122 et. seq. (July 19, 1977) (emphasis added).

These regulations make it clear that the Corps itself interprets Section 10 to require more than a mere showing of some impact on the condition of the water body. Contrary to the Ninth Circuit's decision, Corps regulations require that the

activity not only affect the condition of the water body, but that it affect it "in such a manner as to impact on the navigable capacity of the water body." In the absence of such an impact, no Section 10 permit is required.

The Ninth Circuit spent little time on administrative interpretation, but instead misconstrued cases not on point and confused the plenary power of Congress over interstate commerce with the delegated authority of the Corps and the Secretary.

The Ninth Circuit places reliance on this Court's decision in *Sanitary District* v. *United States,* 266 U.S. 405 (1925) for the proposition that an effect on actual navigable capacity need not be established as a prerequisite to Section 10 jurisdiction. But as the Ninth Circuit opinion itself discloses, the Court reviewed the large diversions from Lake Michigan by the Sanitary District of Chicago and noted "the obvious fact that so large a withdrawal would lower the levels of the lake and *the overwhelming evidence that it would affect navigation.*" *Id.* at 430 (emphasis added). The case thus provides no support for the Ninth Circuit's proposition that an impact on navigable capacity need not be demonstrated.

Curiously, the Ninth Circuit's opinion also cites the Court's decisions in *Wisconsin* v. *Illinois,* 278 U.S. 367 (1929), and *United States* v. *Republic Steel Corp.,* 362 U.S. 482 (1906), as support for its holding. These cases are uniformly cited by commentators as evidencing the fact that Section 10 deals with obstructions to navigation and navigable capacity. *E.g.* Comment, *Environmental Law: Ecology Held Valid Criterion for Denying Dredge and Fill Permit Under Section 10, Rivers and Harbors Act of 1899,* 1970 Duke L.J. 1239, 1243, n.25; D. Harrison and C. Woodruff *supra* at 966, n.56.

As noted previously, the Court in *Wisconsin* v. *Illinois* interpreted Section 10 to prohibit "unreasonable obstructions to navigation and navigable capacity." 278 U.S. at 413. The

Court further concluded that the Secretary of Army's limited authority did not include the power to issue a permit merely to aid a sewage disposal project. *Id.* at 418.

In *United States* v. *Republic Steel Corp.* the trial court had found that the depth of Calumet River had been reduced by the discharge of industrial waste by the defendant to 17 feet in some places and 12 feet in others. The lower court also found that the river was used by vessels requiring a 21 foot draft. 362 U.S. at 483-84. On the basis of this evidence, this Court found an obstruction to navigable capacity within the meaning of Section 10. *Id.* at 485. As support for its holding, the Court cited its earlier decisions in *Wisconsin* v. *Illinois* and *Sanitary District* v. *United States,* and stated:

> "The teaching of those cases is that the term 'obstruction' as used in Section 10 is broad enough to include diminution of the navigable capacity of a waterway by means not included in the second or third clauses. In the *Sanitary District* case it was caused by lowering the water level. Here it is caused by clogging the channel with deposits of inorganic solids. *Each affected the navigable 'capacity' of the river." Id.* at 489 (emphasis added).

B. Section 10 and State Authorized Diversions for Reclamation.

Even if we assume for purposes of argument that jurisdiction exists under Section 10 over some activities which affect the condition of navigable waters, regardless of the activity's effect on navigable capacity, such jurisdiction does not extend to state authorized diversions for reclamation purposes. In order to correctly understand the jurisdictional scope of Section 10 with respect to diversions authorized under state law for reclamation, it is necessary to appreciate the deference to state water laws granted by Congress both before enactment of the 1899 Rivers and Harbors Act and since that time.

In vast areas of the West rainfall is slight, and land is virtually worthless without an adequate supply of water. For these reasons, western water laws came to be based on beneficial use of water rather than correlative rights and the appropriation theory rather than the riparian. Under the appropriation approach the first to make a beneficial use of water is protected in that right to the extent of its use.

At the time these water laws developed, federal policy stressed disposition of the public domain by encouraging homesteading and settlement. By a series of Acts in 1866, 1870, and 1877, Congress legitimized the appropriation approach practiced in the western states, and declared that the water on public lands was open to use, and water rights thereto were to be obtained under the laws of the states and territories. It was settled by this Court in *California-Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142 (1935), that even government patentees had only received land titles and had to acquire water rights in accordance with state law.

As federal activity in the western lands increased, Congress repeatedly included disclaimers in federal enactments of any effect or interference with state laws concerning the control, appropriation, use, or distribution of water, or any vested right acquired thereunder. Such a disclaimer preserving state control over reclamation was included in an 1897 federal reclamation act. This Court in its recent decision of *California* v. *United States*, 438 U.S. 645 (1978), discussed this provision which was proposed as a floor amendment. The Court stated:

> "It was clearly the opinion of a majority of the congressmen who spoke on the bill, however, that such an amendment was unnecessary except out of an excess of caution. According to Congressman Lacey, Chairman of the Committee on Public Lands, and a principal sponsor of the 1897 Act, the water through which the reclamation would be accomplished 'does not belong to the [federal] government. The reservoirs in which the water is stored belong to the

> government, but the water belongs to the states and will be controlled by them. The amendment proposed by the gentleman from Illinois relieves this measure from all possible doubt upon that subject. I think there could be no doubt anyhow, but this amendment takes away the possibility of any question being raised as to the right of the states and territories to regulate and control the management and the price of the water.' " 438 U.S. at 661-662.

This Court then went on to note that "Congressman Lacey's statement found reflection in contemporaneous decisions of this Court holding that, *with limited exceptions not relevant to reclamation,* authority over intrastate waterways lies with the states." *Id.* at 662 (emphasis added). The Court then discussed its holdings in *United States* v. *Rio Grande Irrigation Co.,* 174 U.S. 690 (1899), and *Kansas* v. *Colorado,* 206 U.S. 46 (1906). From the *Rio Grande* decision, the Court cited the following language:

> "Unquestionably the state. . .has a right to appropriate its waters, and the United States may not question that appropriation, unless thereby the navigability of the [river] be disturbed." 438 U.S. at 662.

In discussing its decision in *Kansas* v. *Colorado,* this Court summarized by saying that "[t]he Court . . .held that state reclamation law must prevail" against the contention by the United States that it had a right "to control the whole system of the reclamation of arid lands." *Id.* at 663.

The California Water Project represents a comprehensive scheme for the reclamation of the more arid regions of central, coastal and southern California. It consists of dams, canals, pumping plants and other facilities designed to generate power, provide flood control and transfer water. Both the pumping

plants in question are central to this reclamation project. The limited exceptions to state control over water resources which this Court noted are not relevant to reclamation generally, are likewise not applicable to limit the state's authority in this case. In the absence of a showing of adverse effect on navigation or navigation capacity, Congress had not delegated to the Secretary of the Army and the Corps of Engineers the authority to require the State of California to obtain their approval for these diversion.

C. The Rivers and Harbors Act of 1899 and the Reclamation Act of 1902.

While the Ninth Circuit found congressional approval under Section 10 in various congressional funding authorizations for the Tracy Plant, it reached the issue by erroneously concluding that Section 10 jurisdiction extended to the diversion made by the plant. That this is not the case follows unequivocally from this Court's holding in *California* v. *United States,* 438 U.S. 645 (1978). The Tracy Plant is part of the Central Valley Project authorized by the 1902 Reclamation Act, 32 Stat. 388 (1902), 43 U.S.C. §§ 371-421 (1970). In *California,* this Court made it clear that the Reclamation Act required the Secretary "to appropriate, purchase or condemn necessary water rights in strict conformity with state law." 438 U.S. at 665. Further, the Court stated:

> "Once the waters were released from the dam, their distribution to individual landowners would again be controlled by state law. As explained by Senator Clark of Wyoming, one of the principal supporters of the reclamation bill in the Senate, 'the control of the water after leaving the reservoirs shall be vested in the States and Territories through which such waters flow.' " *Id.* at 667.

This Court went on to hold in *California* that the state could impose any condition on the control, appropriation, use

or distribution of water through a federal reclamation project that is not inconsistent with clear congressional directives respecting the project. *Id.* at 665, 667, 672.

Applications to appropriate unappropriated water for the Central Valley Project were originally filed with the state in 1927 and later assigned to the United States Bureau of Reclamation. Dept. of Water Resources, *Delta Water Facilities-Bulletin 76,* 30 (Cal. July, 1978). The Bureau also filed a number of additional applications in its own behalf. Commencing in 1959, the California State Water Rights Board held hearings on the principal applications for the CVP, including those to divert and redivert water from the Delta. *Id.* In 1961, that Board issued Decision 990 which ordered issuance of permits to the USBR but reserved jurisdiction to fix at a future date the requirements for salinity control in the Delta and the coordinated operation of the Central Valley Project and the State Water Project. *Id.*

The state's authority to authorize and condition the permits for the Tracy Pumping Plant diversion was clearly within its prerogatives under the Reclamation Act as construed by this Court in *California.* It is entirely inconsistent with this Court's decision to now assert that Section 10 jurisdiction applies. The result of the Court's rationale could mean that a state authorized diversion for a federal reclamation project could be prohibited, limited or conditioned by the Secretary of the Army and the Corps of Engineers.

In the process of reaching such a conclusion, the Ninth Circuit mistakenly relied on language in decisions by this Court recognizing the plenary power of Congress over navigation. Thus, the court quotes a portion of the decision in the *Rio Grande* case that "as to navigable waters nothing should be done to obstruct their navigability without the assent of the national government." The Court further cites language from the Court's decision in *Sanitary District* v. *United States,* 266 U.S. 405 (1925), that "there is no question that this power [to

remove obstructions to interstate and foreign commerce] is superior to that of the states to provide for the welfare or necessities of their inhabitants."

It is clear that the federal government's power under the Commerce Clause could override state actions to promote reclamation. But the question which is paramount in this case is whether the Secretary and the Corps have been authorized by Congress in Section 10 of the Rivers and Harbors Act to prohibit or regulate activities, decisions concerning which it has deferred to the states under the Reclamation Act of 1902. It is submitted that the decisions of this Court clearly establish that no such authority exists.

To the contrary, this Court's holding in *California* was that the state may impose any condition in a water right permit respecting the use and distribution of water through a federal reclamation project "that is not inconsistent with clear congressional directives respecting *the project.*" There has been no contention in this case that the permit issued to the Bureau of Reclamation to divert water from the Delta through the Tracy Pumping Plant, or the conditions placed on that permit, are inconsistent with clear congressional directives respecting the Central Valley Project. Indeed, the Ninth Circuit concedes that "it is manifest from the legislative history that Congress was well aware of the Tracy Pumping Plant as part of the Central Valley Project, fully approved of it, and consistently encouraged its construction and *operation.*" Under such circumstances, Section 10 simply does not apply. The Ninth Circuit erred in holding to the contrary.

CONCLUSION

Decisions regarding the allocation of unappropriated water among competing demands have dramatic significance in the western states. In determining where water will be diverted and used, a decision is directly made as to the locale of future growth and community development. In addition, by allocating an amount of unappropriated water to a selected beneficial use, the supply available for competing uses also within the state's legitimate concern is reduced. These decisions although they will ultimately have import to some extent to the nation as a whole, have a significantly more profound effect on the development of the state, as they will shape the priorities for water uses between the states' farmers, cities and industries, and between these uses and competing environmental uses. Thus, determinations as to the use of water in the West involve a delicate and complex balancing of benefits and costs associated with each competing use of water and the area of use. In exercising this responsibility, the states have developed elaborate administrative and judicial machinery which insures that the public will be allowed to fully participate in appropriation hearings, and to provide information relating to competing water needs.

On the other hand, it is not realistic to assume that the Secretary of Army and the Corps of Engineers has a comparable level of interest regarding water management affairs, unassociated with navigation, within an individual state. Nor is it realistic to assume that the Corps has the time or expertise to involve itself in state water management, even assuming an inclination to do so. Congress was undoubtedly influenced by these considerations of public policy in providing for state control of the acquisition, use and distribution of waters within its boundaries for purposes of reclamation.

The Ninth Circuit holding is contrary to what this Court described as the "purposeful and continued deference to state water law by Congress." Without regard to the legitimate purpose of Section 10 to protect the navigable capacity of the

country's waterways, the Ninth Circuit raises the potential of federal encroachment into matters which Congress has wisely deferred to the states. In the process, the Ninth Circuit misconstrues or disregards the relevant decisions of this Court. We therefore urge the Court to grant California's petition to review the Ninth Circuit's decision in this case.

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Supreme Court, U. S.
FILED
NOV 17 1980
MICHAEL RODAK, JR., CLERK

No. 79-1252

In the Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF CALIFORNIA, *et al.*,
Petitioners,

vs.

SIERRA CLUB, *et al.*,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

This case raises the following questions:

(1) Does the Rivers and Harbors Act of 1899, which prohibits obstructions to navigable capacity subject to approval of the Army Corps of Engineers, apply to state water allocations adopted under the water rights laws of the western states, even where the allocations have no substantial effect on actual navigation?

(2) Does the Rivers and Harbors Act of 1899, which applies to diversion works built by a "person" or "corporation," apply to diversion works owned and operated by a state?

(3) Does the Rivers and Harbors Act of 1899 apply to federal reclamation projects built and operated under the Reclamation Act of 1902?

(4) Does the Army Corps of Engineers have authority, under the Rivers and Harbors Act of 1899, to prohibit structures and activities that do not affect the navigable capacity of the nation's navigable waterways?

PARTIES

The respondents, plaintiffs below, are the Sierra Club, a non-profit California corporation; Friends of the Earth, a non-profit New York corporation; Hank Schramm, a commercial fisherman; and William Dixon, a landowner. See Pet. App. 3 n. 1.

The State petitioners, defendants below, are the State of California; Huey D. Johnson, present Secretary of Resources of the State of California; and Ronald B. Robie, present Director of the State Department of Water Resources. See Pet. App. 4 n. 3.

The federal defendants, who have not filed a petition for writ of certiorari, are Cecil Andrus, present Secretary of the Interior; R. Keith Higginson, present Commissioner of the U. S. Water and Power Resources Service, formerly the U. S. Bureau of Reclamation; Clifford L. Alexander, present Secretary of the Army; Lt. Gen. Joseph K. Bratton, present Chief of Engineers, U. S. Army Corps of Engineers; Col. Paul F. Kavanaugh, present District Engineer of the U. S. Army Corps of Engineers, Sacramento District; and Col. Paul Bazilwich, Jr., present District Engineer of the Army Corps of Engineers, San Francisco district. See Pet. App. 4 n. 2.

The intervenors are the Kern County Water Agency; the Metropolitan Water District of Southern California; the Tulare Lake Basin Water Storage District; and the Santa Clara Valley Water District. See Pet. App. 4 n. 3.

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No. 79-1252

In the Supreme Court of the United States

OCTOBER TERM, 1980

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SIERRA CLUB, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Brief for Petitioners State of California, et al.

OPINIONS BELOW

The decision of the U. S. Court of Appeals is officially reported at 610 F.2d 581 (9th Cir. 1979), and is reprinted as an appendix to our petition for writ of certiorari. See Pet. App. 2-65.[1] The decision of the district court is officially reported at 400 F.Supp. 610 (N.D. Cal. 1975), and is reprinted as a supplemental appendix to our petition for writ of certiorari. See Pet. Supp. App. 1-69.

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1. "Pet. App." and "Pet. Supp. App." are references to the appendix and supplemental appendix, respectively, attached to the petition for writ of certiorari filed by the State of California *et al.* in No. 79-1252.

JURISDICTION

The decision of the U. S. Court of Appeals was rendered on October 31, 1979. A petition for rehearing was filed by the plaintiffs on November 21, 1979, and was denied on January 17, 1980. Our petition for writ of certiorari was filed on February 13, 1980, and was granted on October 6, 1980. This Court has jurisdiction under 28 U.S.C. § 1254(1).

FEDERAL LAWS INVOLVED

This case involves an interpretation of sections 9 and 10 of the Rivers and Harbors Act of 1899, 33 U.S.C. §§ 401, 403. Section 10 provides:

> *"Obstruction of navigable waters generally; wharves; piers; etc.; excavations and filling in.*
>
> "The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any port, roadstead, haven, harbor, canal, lake, or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to the beginning of the same." 33 U.S.C. § 403.

Section 9 provides:

> *"Construction of bridges, causeways, dams or dikes generally.*
>
> "It shall not be lawful to construct or commence the construction of any bridge, dam, dike, or causeway over or in

any port, roadstead, haven, harbor, canal, navigable river, or other navigable water of the United States until the consent of Congress to the building of such structures shall have been obtained and until the plans for the same shall have been submitted to and approved by the Chief of Engineers and by the Secretary of the Army: *Provided,* That such structures may be built under authority of the legislature of a State across rivers and other waterways the navigable portions of which lie wholly within the limits of a single State, provided the location and plans thereof are submitted to and approved by the Chief of Engineers and by the Secretary of the Army before construction is commenced: *And provided further,* That when plans for any bridge or other structure have been approved by the Chief of Engineers and by the Secretary of the Army, it shall not be lawful to deviate from such plans either before or after completion of the structure unless the modification of said plans has previously been submitted to and received the approval of the Chief of Engineers and of the Secretary of the Army." 33 U.S.C. § 401.

STATEMENT OF THE CASE

1. Facts of the Case.

In 1960, the California electorate approved an initiative that authorized funding for the State Water Project (SWP), a massive reclamation project that delivers water from rural mountainous areas in northern California to metropolitan and agricultural areas in central and southern California. See Cal. Water Code §§ 12930-12942. This project is owned by the State, and operated by the State Department of Water Resources (SDWR). The SDWR has entered into 31 water supply contracts with irrigation and municipal water districts in central and southern California. The contracts provide for ultimate delivery of approximately 4.2 million acre-feet of water annually from the SWP. Many contracting water districts have entered into other contracts with local agricultural, industrial and domestic users, and have built water distribution works, on the assumption that SWP water would be available

for local needs. The SWP has been in operation since the late 1960's. Pet. App. 7-9; Pet. Supp. App. 4-5, 8-9.[2]

The main component of the SWP is a large dam and reservoir near Oroville on the Feather River, a tributary of the Sacramento River. The dam releases water that eventually reaches the Sacramento-San Joaquin Delta, a maze of interlocking channels which form the confluence of the Sacramento and San Joaquin Rivers. The Delta drains into San Francisco Bay, which in turn drains into the Pacific Ocean. SWP water is exported from the Delta by a State pumping facility located at the south end of the Delta. The exported water flows through a State aqueduct to the contracting water districts in central and southern California. The Sacramento and San Joaquin Rivers, and the Delta which forms their confluence, arise and flow solely in California. Pet. App. 7-8; Pet. Supp. App. 8-9.

Pursuant to the Reclamation Act of 1902, 32 Stat. 388, as amended, 43 U.S.C. §§ 371 *et seq.*, the federal government built its own reclamation project in California, known as the Central Valley Project (CVP). The CVP, which is the largest reclamation project in the nation, was initially authorized by the Rivers and Harbors Act of 1935, 49 Stat. 1028, and the Rivers and Harbors Act of 1937, 50 Stat. 844, 850. The CVP includes several dams and reservoirs on the upper Sacramento and San Joaquin Rivers. The dams release water that flows downstream to the Delta, where CVP water is commingled with SWP water. The CVP is operated by the U.S. Water and Power Resources Service

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2. The SWP presently provides a water supply for approximately 14 million people and serves approximately 500,000 acres of prime agricultural land. See Decision 1485, at p. 2, State Water Resources Cont. Bd. (Aug. 1978), cited at n. 3, *infra.*

A more complete description of the SWP is found at pages 22-28 of SDWR's Bulletin 76 (July 1978), a certified copy of which has been lodged with the Clerk of this Court. The Court can take judicial notice of this document as an official governmental publication. See, *e.g., City of Beatrice v. Edminson,* 117 Fed. 427 (8th Cir. 1902); *Rockville & W. Turnpike Rd. v. Andrews,* 20 F. Cas. 1079 (C.C. Ind. 1844).

(WPRS), formerly the U.S. Bureau of Reclamation. The WPRS has also signed water delivery contracts with many agricultural and municipal water districts in central California. CVP waters are exported from the Delta by a federal pumping facility located at the south end of the Delta, and flow through a federal aqueduct to the contracting water districts in central California. Pet. App. 6-7; Pet. Supp. App. 3-4, 8. See generally *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 727-735 (1950); *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275, 280-284 (1958).

A major problem of California's water supply system is that the Delta's waters are perennially threatened by the intrusion of ocean salt waters. The intruding salt waters pose a threat to valuable economic and environmental interests in the Delta; the Delta sustains a rich agricultural economy, and is the source of unusual species of fish and waterfowl. The intruding salt waters also threaten to degrade the quality of SWP and CVP waters exported from the Delta to the contracting water districts in central and southern California. An effective way to prevent such salinity intrusion is to flush out the salt waters by release of vast quantities of fresh waters from the upstream dams and reservoirs of the SWP and CVP. The more water that is used for flushing purposes, however, the less water is available for export to the contracting water districts. A conflict thus exists between Delta water needs and the water needs of users in central and southern California. The allocation of water between these needs requires a careful balancing of many statewide interests, and will thus have a major impact upon California's economic growth and environmental quality. See n. 3, *infra;* Note, "Delta Water Rights Decision," 2 *Ecol. L. Quar.* 733 (1973).

Under California law, the authority to allocate water among competing needs rests with the State Water Resources Control Board ("State Board"). The State Board has authority to grant appropriative water rights to the extent that such rights are con-

sistent with the "reasonable and beneficial use" of water and in the "public interest." Cal. Const., Art. X, § 2; Cal. Water Code §§ 275, 1201, 1225, 1250-1258, 1375-1415. The SDWR and WPRS have applied to the State Board for permits to appropriate water for use in the SWP and CVP, respectively. After lengthy hearings, the State Board granted appropriative permits subject to conditions that the projects release water from upstream storage or discontinue water exports from the Delta to the extent necessary to meet Delta water quality standards set by the State Board. The State Board has periodically modified its Delta water quality standards on the basis of new information concerning economic, domestic and environmental needs of both Delta and non-Delta interests. The State Board recently issued a landmark administrative decision, Decision 1485, which generally provides that, as a condition of SWP and CVP water exports from the Delta, (1) Delta consumptive uses must receive at least the same water quality which would have been received if the SWP and CVP had not been built, and (2) Delta environmental interests, such as fish and wildlife, must receive a high level of water quality that will ultimately achieve historical levels of protection. Under this decision, the SWP and CVP can export waters from the Delta to the extent these conditions are met. The decision, by defining the conditions for water exports from the Delta, effectively results in an allocation of water among economic, domestic and environmental interests in northern, central and southern California.[3]

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3. The contents of the last two paragraphs are based on findings in Decision 1485, and also on the findings in the water quality control plan and environmental impact report that were issued in conjunction with Decision 1485. See Decision 1485, at pp. 1-19, State Water Resources Cont. Bd. (Aug. 1978); Water Quality Control Plan, at pp. I-1 through I-10, State Water Resources Cont. Bd. (Aug. 1978); Environmental Impact Report, at I-1 through I-10, III-3 through III-30, State Water Resources Cont. Bd. (Aug. 1978). These documents were issued after the

The plaintiff in this case, the Sierra Club, participated in the hearings before the State Board that led to the issuance of Decision 1485, but did not file a lawsuit challenging the State Board's allocation of water under Decision 1485. Therefore, to the extent that the plaintiffs seek to protect Delta environmental interests in the allocation of water between Delta and non-Delta interests, they have a remedy under State law which they have failed to pursue.

To improve the quality of waters exported from the Delta, the State has proposed for several years to build a 42-mile canal around the eastern margin of the Delta that will carry fresh water from the Sacramento River to the SWP and CVP pumping plants in the south Delta. Pet. App. 8; Pet. Supp. App. 10. The canal, known as the Peripheral Canal, would release fresh water into the Delta at selected intervals. *Id.* After years of statewide political controversy surrounding the canal, the California Legislature recently enacted legislation authorizing construction of the canal. See 1980 Cal. Stats., ch. 632.

2. Legal Issues Raised.

Prior to issuance of Decision 1485 and legislative authorization of the Peripheral Canal, the plaintiffs initiated this action against the federal officials who operate the CVP, the State officials who operate the SWP, and the State of California. Various water districts which have contracted for the delivery of SWP water intervened on the side of the defendants.

In the case below, the plaintiffs alleged that (1) sections 9

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conclusion of the trial below, and thus are not part of the official record. The Court, however, can take judicial notice of these documents as official governmental publications. See n. 2, *supra.*

We are lodging copies of these three documents with the Clerk of this Court concurrently with the filing of our brief. We will supply additional copies to the Court upon request.

Several lawsuits have been filed against the State Board by Delta and non-Delta interests, including the United States on behalf of the WPRS, each claiming that Decision 1485 allocates insufficient water to each's own needs. These cases are now pending in the California courts. See *Delta Water Cases,* Judicial Council Coordination Proceeding No. 548, Superior Ct., City and County of San Francisco.

and 10 of the Rivers and Harbors Act of 1899 require that the Army Corps of Engineers ("Corps") issue a permit as a prerequisite to SWP and CVP water exports from the Delta to the contracting water districts, and as a prerequisite to construction of the Peripheral Canal, and (2) the Corps cannot issue such a permit until it has prepared and issued an environmental impact statement pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4347. Pet. App. 5-6.

The defendants alleged that (1) the Rivers and Harbors Act of 1899 does not authorize a private right of action, (2) the plaintiffs lack standing to maintain their action,[4] (3) sections 9 and 10 of the 1899 Act are not applicable to SWP and CVP water exports from the Delta or to construction of the Peripheral Canal, and (4) the requirements of the sections have been met if they are applicable here. In addition, the federal defendants alleged that section 10 is not applicable to CVP water diversions because the diversion works have been expressly authorized by Congress.

3. The Case Below.

The district court rejected the defendants' main arguments, ruling that (1) the Rivers and Harbors Act of 1899 provides for a private right of action, (2) the plaintiffs have standing to maintain their action, (3) sections 9 and 10 of the 1899 Act are applicable to SWP and CVP water exports from the Delta and to construction of the Peripheral Canal, and (4) the requirements of the sections have not been met here. Pet. Supp. App. 1-69.

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4. The State defendants raise no issue at this time concerning the plaintiffs' standing, or whether the 1899 Act authorizes a private right of action. These issues, however, have been raised in the petition for writ of certiorari filed by the intervenors, which has been granted by the Court. See *Kern County Water Agency et al. v. Sierra Club et al.*, No. 79-1502. In our view, the Court should reach the merits of the action regardless of its disposition of these procedural issues because, even if the plaintiffs are procedurally disqualified from maintaining their action, the United States would still be free to assert the rights of the Corps as upheld by the lower court.

The district court, in holding that sections 9 and 10 are applicable here, ruled that SWP and CVP water exports affect "navigable capacity" within the meaning of section 10, because the exports reduce Delta water levels and cause reversal of flows in the Delta. Pet. Supp. App. 29-30. According to its findings, the exports from the SWP pumping plants reduce water levels by approximately 6/10 feet in the vicinity of the plants, but the combined exports from *both* the SWP and CVP plants reduce water levels by less than 1/10 feet, *i.e.* about an inch, in the area of the Delta where commerce is actually carried out.[5] We concede that the exports affect "navigable capacity" in the sense that they reduce Delta water levels, but argue that, since the levels are reduced by only an inch in the area where commerce is actually carried out, the exports do not have any substantial effect on actual navigation or otherwise render the waters unusable for commerce. The district court made no findings on this question.

The Court of Appeals essentially affirmed the decision of the district court. Pet. App. 3-60. The appellate court ruled, however, that section 10 is not applicable to CVP water diversions from the Delta because the diversions have been specifically authorized by Congress. Pet. App. 41-53.

The Court of Appeals, affirming the district court, enjoined the State defendants from exporting water from the Delta or

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5. Specifically, the State pumping plant diverts water from a 2-mile inlet channel which is connected to Italian Slough, which in turn is connected to Clifton Court Forebay. Pet. Supp. App. 8-9. The forebay is connected to a canal that leads to Old River, a tributary of the San Joaquin River. *Id.* The district court found that, although there is "some question as to the accuracy" of the figures, *id.* at 30, the State pumping plant apparently reduces water levels in Italian Slough by approximately 6/10 feet in the vicinity of the plant, and the combined operation of the State and federal plants reduces water levels in the vicinity of Clifton Court Forebay by approximately 1-1½ feet, *id.* at 29. The district court also found, however, that the combined operations of both plants reduce water levels by less than 1/10 feet in the San Joaquin River, where commerce is actually carried out. *Id.;* Pet. App. 8 n. 5. The tide alone causes Delta water levels to vary by 3-3½ feet per day. J.A. 121a (R. 423).

commencing construction of the Peripheral Canal prior to obtaining a permit from the Corps. Pet. App. 58-59. The appellate court stayed the injunction with respect to water exports until the Corps issues a permit, but did not stay the injunction with respect to construction of the Peripheral Canal. Pet. App. 58-59.[6]

SUMMARY OF ARGUMENT

I

The Rivers and Harbors Act of 1899 prohibits any "obstruction" to "navigable capacity" of the nation's navigable waterways in the absence of congressional approval. The Act provides, however, that the Army Corps of Engineers ("Corps") has authority to approve certain such obstructions. The primary question in this case is whether the Act applies to water allocations authorized under the water rights laws of the western states.

The purpose of the 1899 Act was to fill a federal regulatory void caused by the absence of any federal common law relating to navigation obstructions. With respect to water allocations authorized under state water rights laws, however, there is no federal regulatory void. Instead, Congress has enacted several laws, primarily in the areas of mining, desert lands and reclamation, that delegate broad authority to the western states to allocate their sparse water supply among competing regional and local needs. These congressional laws establish an historic policy, often upheld by this Court, of deferring to state water rights laws. This historic policy is undermined if the 1899 Act is construed as authorizing the Corps to veto State water allocations.

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6. The appellate court remanded the case to the district court for determination of whether the State pumping plant is exempt from the permit requirements of the 1899 Act because of a "grandfather clause" provision in the Corps' regulations. Pet. App. 56-57. The case would not be moot even if the district court finds that the State pumping plant is thus exempt from the Act. First, the exemption, if it exists, would apply only to existing pumps, not to pumps which have not yet been built. The State plans to build additional pumps that will enlarge the plant's capacity by 60% in 1980. Pet. App. 8. Second, the exemption would not apply to the Peripheral Canal, which has not yet been built.

In our view, the 1899 Act should be accommodated and harmonized with the historic congressional policy of deferring to state water rights laws. Under our view, the 1899 Act should be construed as either (1) not applicable to water allocations adopted under state water rights laws, subject to Congress' power to override such allocations if they impair federal navigation interests, or (2) applicable to state water allocations only to the extent that such allocations substantially interfere with actual navigation or otherwise render the waters unusable for commerce. This result, we believe, results in an accommodation of Congress' disparate laws and policies on the related subjects of navigation and reclamation.

Our suggested alternative approaches are supported by the historic role played by the western states and the Corps over control of the West's sparse water resources. The states, acting pursuant to the congressional delegation of authority, have traditionally allocated water under their water rights laws, and have thus reclaimed much of their arid lands and achieved a large measure of economic growth and prosperity. The Corps, acting under the 1899 Act, has not traditionally controlled water allocations in the West. Under the Court of Appeals' decision, however, the Corps would have virtually plenary authority to override state water allocations, and thus determine the priority of water among competing economic and environmental needs.

II

The Rivers and Harbors Act of 1899 provides for penal sanctions and injunctive relief only against a "person" or "corporation," and thus apparently applies only to a "person" or "corporation." There is no indication in the Act or its legislative history that these terms were meant to include the sovereign states. Therefore, the Act does not apply to diversion works owned and operated by the states.

III

The Rivers and Harbors Act of 1899 does not apply to reclamation works built and operated by the federal government under the Reclamation Act of 1902. The latter Act provides that such works are to be operated by the U. S. Water and Power Resources Service (WPRS), and that state law controls federal water uses under the Act except to the extent that such state laws are inconsistent with "clear congressional directives." See *California v. United States*, 438 U.S. 645 (1978). Thus, the 1902 Act authorizes the WPRS to operate the works subject to state laws that are not in conflict with specific federal laws. There is no indication, either in the 1902 Act or its legislative history, that Congress meant for the Corps to control the allocation of water from these works under the 1899 Act.

IV

The Court of Appeals ruled that the Rivers and Harbors Act of 1899 applies to structures and activities that have no effect on navigable capacity. This ruling is dictum, for—although we maintain that the diversion works in this case do not substantially interfere with federal navigation interests—we concede that the works affect, however insubstantially, navigable capacity.

The court's dictum is erroneous. The 1899 Act prohibits obstructions to navigable capacity in the absence of congressional approval, except to the extent that certain such obstructions are approved by the Corps. The purpose of this statutory scheme is to provide a method to obtain administrative approval of certain such obstructions without seeking redress from Congress. Therefore, the Corps has power only to authorize that which is otherwise prohibited by the Act, and has no jurisdiction over obstructions that do not affect navigable capacity.

ARGUMENT

INTRODUCTION

The fundamental question in this case is whether the Army Corps of Engineers ("Corps") has authority, under the Rivers and Harbors Act of 1899, to control water allocations authorized under the water rights laws of the western states, particularly where the allocations have no substantial effect on actual navigation. For many decades, it has been assumed that the Corps' authority under the Act is limited to structures or activities unrelated to state water allocations. The Act has been applied, for example, to bridges, piers and other structures that impede navigation, and to sewage discharges that cause water pollution. In none of these cases has the Act been applied to restrain state water allocations, particularly where, as here, the allocations have no measurable impact on actual navigation.

As this Court has held on several occasions, Congress has delegated broad authority to the western states to control water allocations under their water rights laws. Acting under this delegated authority, the western states have reclaimed much of their arid lands, and thus achieved a large measure of economic growth and prosperity. In this case, for example, California has undertaken a massive effort to redistribute its limited water supply in order to serve many important public needs. Congress' historic tradition of deferring to state water rights laws is undermined by the lower decision, which holds that the Corps has virtually plenary authority to override state water allocations.

Certainly Congress has constitutional authority to override state water allocations where federal navigation interests are affected. Congress has exercised this power sparingly, however, in keeping with its tradition of deferring to state water rights laws. Nothing in the 1899 Act indicates that Congress meant to depart from this tradition in enacting the Act.

In our view, this Court should accommodate federal navigation interests with state reclamation interests in construing the 1899

Act, rather than wholly ignore either interest. In this brief, we suggest two alternative approaches which would achieve such an accommodation. Preferably, the Court should hold that the 1899 Act is not applicable to water allocations adopted under state water rights laws, but that Congress has authority to override such allocations to protect federal navigation interests. Alternatively, the Court should hold that the 1899 Act restrains state water allocations only to the extent that such allocations interfere with important federal navigation interests, in the sense that they substantially interfere with actual navigation or otherwise render the waters unusable for commerce. These suggested arguments, we believe, result in a proper balancing of federal and state interests with respect to control of water resources in the West, and thus reaffirm the historic federalism which Congress has steadfastly pursued on this subject.

I. IN LIGHT OF THE HISTORIC CONGRESSIONAL POLICY OF DEFERRING TO STATE WATER RIGHTS LAWS GOVERNING WATER ALLOCATIONS IN THE WESTERN STATES, SECTIONS 9 AND 10 OF THE RIVERS AND HARBORS ACT OF 1899 SHOULD BE CONSTRUED AS NOT AFFECTING SUCH ALLOCATIONS, OR ALTERNATIVELY AS AFFECTING SUCH ALLOCATIONS ONLY TO THE EXTENT THAT THEY SUBSTANTIALLY INTERFERE WITH FEDERAL NAVIGATION INTERESTS.

A. SECTIONS 9 AND 10 OF THE RIVERS AND HARBORS ACT OF 1899.

The first clause of section 10 of the Rivers and Harbors Act of 1899 prohibits any "obstruction" to "navigable capacity" of the nation's navigable waterways in the absence of congressional approval. 33 U.S.C. § 403; see p. 2, *supra*. The second and third clauses of section 10, as well as section 9, provide methods for legitimizing certain such obstructions without congressional approval. Specifically, section 9 legitimizes certain structures, such as bridges and dams, if approved by the Corps and the legislature of the affected state. 33 U.S.C. § 401; see pp. 2-3, *supra*. The second clause of section 10 legitimizes certain other structures,

such as wharves and piers, if approved simply by the Corps. 33 U.S.C. § 403; see p. 2, *supra*. The third clause of section 10 legitimizes certain *activities* that may "alter or modify" the "condition" or "capacity" of navigable waters, such as excavations and fills, if such are approved by the Corps. 33 U.S.C. § 403; see p. 2, *supra*. In short, the first clause of section 10 imposes a general prohibition against obstructions to navigable capacity without congressional approval, and the other provisions qualify the broad reach of the prohibition by authorizing certain such obstructions without Congress' consent.[7]

Section 10, in prohibiting obstructions to "navigable capacity," has a very broad reach. As the district court properly held, an obstruction to "navigable capacity" includes any structure that affects *hypothetical* navigation, regardless of whether it affects *actual* navigation. Pet. Supp. App. 25-27. The section thus requires examination of the kinds of commerce that might be carried on at a future time, not just the kinds of commerce that are carried on at the present. *Id.*; see *United States v. Republic Steel Corp.*, 362 U.S. 482, 487 (1960). The section applies to obstructions that affect both potential and actual commerce.

The primary question here is whether section 10 applies to water diversions authorized under the water rights laws of the western states. Such diversions typically have an effect on "navigable capacity," in the sense that the diversions at least affect *hypothetical* navigation. That is, most diversions from a navigable

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7. The Court of Appeals held, however, that the second and third clauses of section 10, as well as section 9, are not *qualifications* of the general prohibition against navigation obstructions contained in the first clause of section 10, but instead impose *prohibitions* that are in addition to the general prohibition. Pet. App. 24-27. As we explain more fully below, the lower court's analysis is dictum, because we concede that the diversions in this case have an effect, however minor, on navigable capacity. See pp. 52-58, *infra*. Because of the broad implications of the dictum upon western water law, however, we analyze the dictum below for the purpose of showing that it is contrary to the meaning of sections 9 and 10. We have deferred our discussion of this dictum because it is peripheral to our main argument that sections 9 and 10, however construed, are not applicable to water allocations authorized under state water rights laws.

stream diminish, however slightly, the flow of water in the stream. The diminution of the flow affects, however slightly, hypothetical if not actual navigation. In this case, for example, water diversions by the SWP and CVP have no impact on *actual* navigation, because they lower Delta water levels by about an inch in locations where commerce is actually carried forth. See n. 5, *supra*. The lowered water levels, however, may have *some* impact, however nominal, on *hypothetical* navigation. Therefore, if section 10 is construed as applicable to water diversions authorized under state water rights laws, the section would prohibit, subject to Corps approval, most water diversions authorized under such state laws. The Corps would thus exercise veto power over most water allocations authorized under the laws of the western states.

The historical circumstances that led to the enactment of the 1899 Act indicate that Congress did not contemplate that the Act would apply to water allocations authorized under state water rights laws. The Act originated in the Rivers and Harbors Act of 1890, 26 Stat. 454. As this Court has noted, the 1899 Act simply rearranged the provisions of the 1890 Act, and did not substantively alter their meaning. See *Wisconsin v. Illinois,* 278 U.S. 367, 412 (1929); *United States v. Republic Steel Corp.*, 362 U.S. 482, 486 (1960). The 1890 Act, as this Court has noted, was intended to overcome the effect of this Court's decision in *Williamette Iron Bridge Co. v. Hatch,* 125 U.S. 1 (1888). See *Wisconsin v. Illinois, supra* at 412; *United States v. Republic Steel Corp., supra* at 486. In the *Williamette Bridge* case, an action was brought to restrain the private construction of a bridge over navigable waters in Oregon, on grounds that the bridge constituted an obstruction to navigation. This Court, in rejecting the action, ruled that "there is no common law of the United States which prohibits obstructions and nuisances in navigable waters . . . ." 125 U.S. at 8. Although Congress has undoubted authority to prohibit such obstructions, no federal common law bars such obstructions until

Congress acts. *Id.* at 10-11. See also *Gilman v. Philadelphia,* 70 U.S. (3 Wall.) 713, 724 (1886); *Cardwell v. American Bridge Co.,* 113 U.S. 205, 208-209 (1885); *Hamilton v. Vicksburg, Shreveport & Pac. R.R.,* 119 U.S. 280 (1886).[8]

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8. The *Williamette Bridge* decision concluded, however, that federal common law precludes a state from placing obstacles in navigable, interstate waters that impair the rights of other states in such waters, 125 U.S. at 15-17. Accord, *Pennsylvania v. Wheeling & Belmont Bridge Co.,* 54 U.S. (13 How.) 518 (1852). This Court has developed federal common law rules governing disputes where one state diverts interstate waters to the detriment of other states, under which the waters must be "equitably apportioned" between the states. See, *e.g., Nebraska v. Wyoming,* 325 U.S. 589, 618 (1945); *New Jersey v. New York,* 283 U.S. 336, 342-343 (1931). This Court has also developed a "federal common law nuisance" doctrine governing disputes where one state pollutes interstate waters to the detriment of other states. See *Illinois v. City of Milwaukee,* 406 U.S. 91 (1972).

On its face, the *Williamette Bridge* decision, in holding that the federal common law does not bar obstructions in navigable waters where the rights of other states are unaffected, appears to be obliquely inconsistent with other decisions of this Court respecting federal power under the Commerce Clause. This Court has held that, at least where navigable waters are not involved, the federal government has inherent power to prevent obstructions to interstate commerce even in the face of congressional silence. See *In re Debs,* 158 U.S. 564 (1895); *United States v. San Jacinto Tin Co.,* 125 U.S. 273, 279-280, 284 (1888). Further, there is no question that an action can be maintained under the Commerce Clause to restrain a state from imposing an unreasonable burden on interstate commerce, even where Congress has not authorized such an action. See, *e.g., Covington & Cincinnati Bridge Co. v. Kentucky,* 154 U.S. 204 (1894); *Hall v. DeCuir,* 95 U.S. 485 (1978). Indeed, it appears that, under the English common law, the sovereign has an inherent right to prevent obstructions and nuisances in navigable waters that prevent the free flow of commerce. See Note, "Substantive and Remedial Problems in Preventing Interferences with Navigation: The Republic Steel Case," 59 *Colum. L. Rev.* 1065, 1074-1076 (1959); Wisdom, "Obstructions in Rivers," 119 *Just. P.* 846 (1955).

It is submitted, however, that the *Williamette Bridge* decision can be reconciled with this Court's other decisions respecting inherent federal powers under the Commerce Clause. In *Williamette Bridge,* the Court appeared to suggest that the states have broader control over their navigable waters than over other avenues of commerce. That is, Congress gave the states broad control of their navigable waters under the "equal footing" doctrine, see *e.g., Pollard's Lessee v. Hagan,* 44 U.S. (3 How.) 212 (1845), and this control includes the right to create obstacles to commerce unless Congress affirmatively revokes the power. Congress did not, however, grant the states the same control over other avenues of commerce, and thus the federal government has inherent power to prevent obstructions of these other avenues.

The 1899 Act thus originated in the 1890 Act, the purpose of which was to overcome the absence of a federal common law applicable to obstructions in navigable waters. The 1890 and 1899 Acts, by prohibiting such obstructions except where approved by the Corps, filled the void created by the absence of any federal regulatory laws on the subject. With respect to water allocations authorized under state water rights laws, however, there is no federal regulatory void. Instead, as we shall see in the next part of this brief, Congress has legislated extensively in this area. Under its legislative scheme, Congress has delegated broad authority to the western states to control such allocations under their water rights laws. Nothing in the 1890 or 1899 Acts indicates that Congress meant to withdraw or limit its delegation of authority to the states to control water allocations. Since the purpose of the 1890 and 1899 Acts was to fill a void created by congressional inattention, and since no such void exists with respect to state control of water allocations, it is clear that the 1890 and 1899 Acts were not intended to limit such state control.

This conclusion is supported by the legislative history of the 1890 and 1899 Acts. In the congressional debates relating to the 1890 Act, on which the 1899 Act was based, the only example of the kind of structure regulated by the Act that was cited during the debates was the construction of a "bridge" by a "railroad company" or other "corporation" over navigable water.[9] A bridge

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9. For example, Senator Vest stated on several occasions that the Act would apply to "railroads" which built "bridges" over navigable waters. 21 Cong. Rec. 8603-8604, 8606 (1890). He also mentioned on several occasions that the Act would apply to "bridges" built by "corporations." *Id.* at 8603-8604, 8690. Senator Gray stated the Act would prevent a state from authorizing construction of a "bridge" over navigable waters, even though the bridge might be part of a road system authorized by the state. *Id.* at 8604. Senator Dolph stated that, under the Act, "whenever a State authorizes a *bridge* over a navigable stream the plan shall be submitted to the Secretary of War and approved by him before the bridge shall be built;" it is "wise," he stated, "to require that all *bridges* authorized under State laws shall also be approved by the Secretary of War," and that "where the States authorize the construction of *bridges,*

—which is the same kind of structure involved in the *Willamette Bridge* case—is not the kind of structure that is related to water allocations authorized under state water rights laws. Further, no mention was made during the debates of the various federal laws which, as we shall see in the next part of this brief, delegate authority to the western states to control the allocation of their waters. This congressional silence is significant because many of these federal laws had been enacted shortly before the passage of the 1890 and 1899 Acts. It is thus evident that Congress, in enacting the 1890 and 1899 Acts, had in mind the kinds of obstacles, such as bridges, that had never received congressional attention. It did not have in mind the state water allocation systems that Congress had recognized and upheld on several prior occasions.

B. CONGRESSIONAL DELEGATION OF AUTHORITY TO THE STATES TO CONTROL WATER ALLOCATIONS.

We now examine the congressional laws that authorize the western states to control water allocations under their water rights laws. As we shall see, Congress delegated broad authority to the states in this area, so that the states could reclaim the "howling wilderness" depicted earlier by Daniel Webster. See 1 Kinney, *Irrigation and Water Rights* 8 (2d ed. 1912). Congress thus

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. . . the plans should be approved by the Secretary of War as plans are required to be approved of *bridges* authorized by Congress." *Id.* at 8605. (Emphasis added.) Senator Carlisle stated that the Act establishes the "policy . . . of authorizing the Secretary of War through the Corps of Engineers to superintend the construction of *bridges* across navigable streams," and further "proposes to authorize the Secretary of War to cause the removal or alteration of *bridges* heretofore unlawfully constructed under statutes passed by the State legislatures, which they had a right to pass." *Id.* at 8990. (Emphasis added.)

Significantly, the above statements indicate that the congressional focus was not only limited to bridges and other such structures, but was also limited to structures that were built by private entities rather than states. This conclusion appears from other parts of the congressional debates. For instance, Senator Hoar stated that the Act would apply to a "corporation," *id.* at 8606, Senator Edmunds stated that the Act would apply to a "railroad company," *id.* at 8607, and Senator Gray also stated that the Act would apply to "railroad companies," *id.* at 8606.

expressed its will on the effect of state water rights laws by a series of enactments passed shortly before the 1899 Act. If, in enacting the 1899 Act, Congress had meant to radically depart from a course chartered shortly before, it would have spoken with reasonable clarity. The absence of such clarity in the 1899 Act is a clear indication that no such departure was intended.

1. Development of State Water Rights Laws.

Before turning to the congressional laws that delegate authority to the western states to control the allocation of water resources, it is necessary to first understand the historical forces that led to the enactment of these laws. Because of the unique circumstances of the West, where water is in short supply, a unique doctrine of water rights law has been developed to provide for maximum utilization of the West's water resources. In the early West, water rights law was based on the riparian doctrine, a common law doctrine which is traceable to the Institutes of the Roman Emperor Justinian. Under this doctrine, a landowner has the right to use water on lands that are appurtenant to the waterway. The discovery of gold in California in 1848, however, produced a migratory surge that placed increasing demands on the West's limited water resources. In response to these demands, a new doctrine of water law emerged as a custom among the early miners and farmers, and was soon recognized by the early courts and legislatures. Under this new doctrine, known as the doctrine of prior appropriation, a water user has the right to "appropriate," or divert and use, water that is not appurtenant to his lands, as long as he puts the water to reasonable and beneficial use. The state has authority to determine whether he is putting water to reasonable and beneficial use, and can limit his right to the extent that he fails to do so. See generally *United States v. Gerlach Live Stock Co.*, 339 U.S. 725, 742-750 (1950); *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 153-157 (1935); *Jennison v. Kirk*, 98 U.S. 453, 456-459 (1878).

With the growth and development of the West, the western states developed administrative and judicial systems as a means to determine whether a proposed water use results in reasonable and beneficial use, and thus whether the water user should have the right to divert and use the water. See, *e.g.*, I Hutchins, *Water Rights Laws in the Nineteen Western States* 302 (1971).[10] Under the administrative systems, a water user who seeks to appropriate water must apply for, and obtain, an appropriative permit from the state in which the water is located. *Id.* The state issues the permit only if the applicant shows that he will put water to reasonable and beneficial use, and can impose conditions to the extent necessary to ensure that water is put to such use. *Id.* These administrative water rights systems are the functional basis of modern western water law. California adopted such an administrative system in 1914. See Cal. Water Code §§ 1000-5975.

The western states, in granting water rights under their administrative and judicial systems, effectively allocate water among competing regional and local needs. These allocations provide water for drinking and sanitation purposes for people who reside in communities located far from the water source. They provide irrigation water to farms that grow foods for sale and consumption in local, national, and international markets. They provide cooling water for industrial plants that manufacture foods or goods. They provide the power behind hydroelectric dams that generate electricity for homes and industries. They provide a habitat for fish and wildlife. These various needs are served by the SWP and CVP water exports in this case. See pp. 3-5, *supra.* The exports are part of a monumental effort to obtain the widest possible benefit from the State's limited water supply.

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10. Of the eighteen western continental states, all but two require an appropriator of surface water to obtain an appropriative permit from the state. *Id.* The exceptions are Colorado and Montana. *Ibid.* Colorado provides a system of statutory adjudication for the acquisition of appropriative rights, rather than an administrative system. *Ibid.* Montana provides for the acquisition of appropriative rights by either statutory adjudication or by posting of notice and filing of records. *Ibid.*

The allocation of water under state water rights laws is thus the key to the West's economic growth and environmental quality. Unlike other regions in the nation, the arid West lacks sufficient water to make its lands habitable and productive unless water is diverted from its natural channel to other areas where it is needed for human consumption. As the California Supreme Court has stated:

> "The conservation of other natural resources is of importance, but the conservation of the waters of the State is of transcendent importance. Its waters are the very life blood of its existence." *Chow v. City of Santa Barbara,* 217 Cal. 673, 702 (1933).

The allocation of water under state water rights laws thus results in the maximum utilization of the West's limited water supply. It has played a major role in converting the great western desert into a modern situs of bustling cities and thriving farms.

2. The "Severance" and "Equal Footing" Doctrines.

Having examined the historical forces that led to the adoption of the water rights laws of the western states, we now turn to the congressional laws that recognize and uphold such state laws. In the late nineteenth century, doubts were raised concerning the validity of the appropriation doctrine adopted by the western states, as applied to waters traversing the public domain lands owned by the federal government. To resolve these doubts, Congress enacted several laws that effectively "sever" the waters from the public domain lands, and provide that state water rights laws control the appropriation of water in the West, whether or not the water traverses the public domain lands.

The Mining Act of 1866, 14 Stat. 251, 253, as amended, 16 Stat. 217, 218 (1870), which authorized miners to occupy and use the public domain lands for mining purposes, provided that the right to use water on the lands was subject to "local customs, laws and the decisions of the courts." 14 Stat. at 253. This Act

constituted the first congressional recognition of the appropriation doctrine which had become the basis of western water law. This Court, commenting on the Act's effect, noted that the appropriation doctrine developed by the western states was an "absolute necessity" in view of the sparseness of the West's water supply. *Broder v. Water Co.*, 101 U.S. 274, 276 (1879). See *California v. United States*, 438 U.S. 645, 656 (1978); *United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690, 705 (1899); *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U.S. 142, 153-157 (1935); *Ickes v. Fox*, 300 U.S. 82, 95 (1937).

A few years later, Congress, seeking to encourage settlement of the western lands, enacted the Desert Land Act of 1877, 19 Stat. 377. This Act granted lands to those who settled on the arid western lands. It further provided that the settlers' rights to water "shall depend on bona fide prior appropriation," and that unappropriated, non-navigable waters not acquired by the settlers were "free for the appropriation and use of the public for irrigation, mining and manufacturing purposes." 19 Stat. 377. In *California Oregon Power Co. v. Beaver Portland Cement Co., supra*, this Court held that the 1877 Act, in conjunction with the earlier mining acts, effected a "severance of all waters upon the public domain, not theretofore appropriated, from the land itself." 295 U.S. at 153-157. Under this severance, the western states have broad control of their unappropriated waters, whether or not the waters flow across federally-owned lands. As a result of the severance, the states have the right to adopt the riparian or appropriation doctrine, or a combination of the two; the federal government cannot force any rule upon the state. *Id.* at 163-164. See *California v. United States, supra* at 657-658; *Ickes v. Fox, supra* at 95.

Independently of the "severance" doctrine, the states also have broad authority to control their navigable waters under the "equal footing" doctrine. When the original thirteen states formed a new Union to replace the outworn confederacy, they retained con-

trol of their navigable waters, including the fisheries therein and the underlying beds. See, *e.g., Pollard's Lessee v. Hagan,* 44 U.S. (3 How.) 212, 224-229 (1845); *Shively v. Bowlby,* 142 U.S. 1, 49-50 (1894); *United States v. Oregon,* 295 U.S. 1, 14 (1935); *United States v. Texas,* 339 U.S. 716-717 (1950). When new states joined the Union, they were admitted on an "equal footing" with the original thirteen states, and thus also acquired control of their navigable waters. *Id.* Therefore, the western states enjoy the same control of their navigable waters that is enjoyed by the original thirteen states. The "equal footing" doctrine thus provides another basis, in addition to the "severance" doctrine, for state control of water.

As this Court has often noted, the states' control of their unappropriated waters under the "severance" and "equal footing" doctrines is subject to paramount federal powers under the navigation servitude and the reserved rights doctrine. See *California Oregon Power Co. v. Beaver Portland Cement Co., supra* at 159; *California v. United States, supra* at 662; *United States v. Rio Grande Dam & Irrig. Co., supra* at 703.[11] Under the navigation

11. The Desert Land Act of 1877, by its terms, applies to waters that are "not navigable." 19 Stat. 377. The Mining Act of 1866, however, contains no such limitation. See 14 Stat. 251, 253 (1866), as amended, 16 Stat. 217, 218 (1870). The *Beaver* Court appeared to suggest that these acts, in conjunction, provide for state control of all unappropriated waters, whether or not the waters are navigable; it stated that the severance of water from public domain lands applies to "all waters upon the public domain, not theretofore appropriated. . . ." 295 U.S. at 158.

The question whether the Desert Land Act of 1877 and related acts are confined to nonnavigable waters is now largely moot. Subsequent congressional statutes, particularly in the reclamation area, provide for broad state control of water regardless of the navigability of the water. See, *e.g.,* Reclamation Act of 1902, § 8, 43 U.S.C. §§ 372, 383; Federal Water Supply Act of 1958, 43 U.S.C. § 390(b). Moreover, as noted above, this Court has held on several occasions that the "equal footing" doctrine provides a basis for state control of navigable waters. See, *e.g., Pollard's Lessee v. Hagan,* 44 U.S. (3 How.) 212, 224-229 (1845). These various doctrines and developments make clear that state water laws extend to *all* waters, whether navigable or not, to the extent not inconsistent with the navigation servitude and the reserved rights doctrine. Accord, *California v. United States, supra* at 662.

servitude, the federal government has power to protect the navigability of the nation's waterways, to ensure that such waters can continue to serve as the great highways of commerce. See *e.g.*, *California Oregon Power Co. v. Beaver Portland Cement Co.*, *supra* at 159-162; *California v. United States*, *supra* at 662.[12] Under the reserved rights doctrine, the federal government has power to use waters, navigable or otherwise, to the extent necessary to serve the needs of federal lands withdrawn from the public domain. See, *e.g.*, *United States v. New Mexico*, 438 U.S. 696 (1978); *Cappaert v. United States*, 426 U.S. 128, 138-42 (1976); *Arizona v. California*, 373 U.S. 546, 595-601 (1963). As this Court recently noted in *California v. United States*, *supra*:

> "[E]xcept where the reserved rights or navigation servitude of the United States are invoked, the State has total authority over its internal waters." 438 U.S. at 662.

We do not, of course, argue that Congress lacks power under the navigation servitude or reserved rights doctrine to override state water rights laws. Instead, we argue that Congress, under the "severance" and "equal footing" doctrines, has established a clear policy of deferring to state water rights laws where important federal interests are not at stake. This policy results in an historic accommodation of federal and state interests with respect to control of water resources in the West. It should not be presumed

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12. In *Kaiser Aetna v. United States*, 100 S.Ct. 383 (1979), this Court recently reaffirmed the distinction between the navigation servitude and Congress' regulatory power over commerce. As the Court noted, the navigation servitude involves the limited power to protect navigation. 100 S.Ct. at 389-392. Congress' regulatory power over commerce, however, is much broader; it applies whether or not navigation, or even water, is involved. *Id.* Since the Court has traditionally held that state control of navigable waters is limited only by the navigation servitude and the reserved rights doctrine, it has made clear that such state control is not limited by Congress' regulatory power over commerce. This is apparently the reasoning behind the Court's widely-quoted comment in *Kansas v. Colorado*, 206 U.S. 46, 92 (1907), that federal laws cannot "override state laws in respect to the general subject of reclamation." See *California v. United States*, *supra* at 663.

that Congress means to depart from this policy unless it speaks with reasonable clarity, or unless important federal interests are at stake. No such clarity is found in the Rivers and Harbors Act of 1899, for the Act provides no indication that Congress meant to restrain the western states' right to control the allocation of their waters. Moreover, important federal interests are not at stake in this case, for the water diversions by the SWP and CVP do not substantially affect actual commerce dependent on the Delta's waters. Therefore, it is unlikely that Congress meant for the 1899 Act to apply to the water diversions in this case.

3. Federal Reclamation Laws.

Congress, beyond establishing a general policy of deferring to state water rights laws, has specifically applied this policy in the context of land reclamation. It has thus upheld the right of the western states to allocate their waters as a means for achieving economic growth and prosperity. This conclusion is significant here because the primary purpose of water exports from the Delta by the CVP and SWP is to reclaim the semiarid lands of California, and thus utilize California's limited water supply for varied public purposes. Hence, Congress has deferred to state water rights laws in the very context presented in this case.

Congress initially addressed the subject of reclamation in the late nineteenth century. In 1891, Congress provided for the acquisition of rights-of-way across public lands by "any canal or ditch company formed for the purpose of irrigation." Act of March 3, 1891, 26 Stat. 1101, as amended, 43 U.S.C. § 946.[13] This Act

13. Congress had earlier adopted laws, such as the Homestead Act of 1862, 12 Stat. 392, to encourage settlement of the West's unpopulated lands. To avoid the possibility that settlers would acquire sites that are suitable for reclamation, Congress provided in 1888 that lands selected or designated as reservoir sites by the federal government would be reserved from settlement. Act of October 2, 1888, 25 Stat. 527. The Act was repealed, however, when it became clear that the Act reserved all western public lands from settlement. Act of August 30, 1890, 26 Stat. 391. Congress passed the 1891 Act to fill the void created by its repeal of the 1888 Act. See *California v. United States*, 438 U.S. 645, 661 (1978).

specifically provided, however, that "the privilege herein granted shall not be construed to interfere with the control of water for irrigation and other purposes under authority of the respective States or Territories." 26 Stat. 1101. Congress amended the Act in 1897 to make clear that the Act does not preclude construction of reclamation works on sites surveyed by the federal government. Act of Feb. 26, 1897, 29 Stat. 599. The 1897 amendment expressly authorized the states to control the management and pricing of water developed by reclamation works built under authority of the Act. *Id.* The 1890 Act and its 1897 amendment thus provided that reclamation shall be carried forth in conformity with state laws. See *California v. United States,* 438 U.S. 645, 659-662 (1978).

This Court recently noted that "it was clearly the opinion of a majority of the Congressmen who spoke on the bill [which became the 1897 amendment] . . . that such an amendment was unnecessary except out of an excess of caution." *California v. United States, supra* at 661. According to Congressman Lacey, Chairman of the House Committee on Public Lands and a principal sponsor of the bill:

> "The water [through which the reclamation would be accomplished] does not belong to the [Federal] Government. The reservoirs in which the water is stored belong to the Government, but the water belongs to the States and will be controlled by them. The amendment proposed by the gentleman from Illinois [Mr. Cannon] relieves this measure from all possible doubt upon that subject. I think there could be no doubt anyhow, but this amendment takes away the possibility of any question being raised as to the right of the States and Territories to regulate and control the man-

agement and the price of the water." 20 Cong. Rec. 1952 (1897). See *California v. United States, supra* at 662[14]

Thus, the 1891 Act and its 1897 amendment made clear that state law controls the reclamation of land in the West, at least to the extent that reclamation is undertaken by private enterprise. Significantly, the 1891 and 1897 Acts were adopted *after* the Rivers and Harbors Act of 1890 which, as noted earlier, was the forerunner of the Rivers and Harbors Act of 1899. If Congress had intended that the 1890 Act would limit state control of reclamation under the 1891 and 1897 Acts, Congress would surely have so indicated. To the contrary, the legislative history of the 1891 and 1897 Acts makes clear that the states were to have exclusive control of the reclamation process.

A few years later, Congress embarked on its own program to reclaim the arid lands of the West. It enacted the Reclamation

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14. The Court in the *California* case cited the following statements made during the congressional debates:

> " 'A reservoir site without water is entirely useless. The water is the particular thing in question, and the waters are controlled by the States through which they flow, and not by the United States of America. These are surface waters, the waters of small streams not navigable, and the States control them.
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> " '[T]he United States does not control the water. It controls only the reservoir sites in which the water may be collected. The water is under the control of the States.' 29 Cong. Rec. 1948-1949 (1897) (Cong. Lacey). 'It is the State alone that owns and controls the water, under the constitution of our States; and I suppose that is true under the laws of every State.' *Id.* at 1951. (Cong. Bell). 'The amendment which has been proposed by the gentleman from Illinois [Mr. Cannon], and adopted, really serves no purpose, because it merely reenacts the existing law. It would be the law even if the act of 1891 were not in existence. The waters belong to the States. The United States Government has always recognized that, and the States have enacted legislation directly controlling the use of the waters.' Id., at 1952 (Cong. Shafroth). Only Congressman Terry, who unsuccessfully opposed the bill, suggested the contrary. In his view, the Federal Government could use its control of the land to regulate the price of the water stored. See *id.*, at 1949-1950." 438 U.S. at 661 n. 16.

Act of 1902, 32 Stat. 388 (1902), as amended, 43 U.S.C. §§ 371 *et seq.*, which provides for federal construction and operation of reclamation dams and other works in the West. Importantly, Congress continued and extended the principle of state control of water under the Act. Section 8 thereof provides that the Act shall not be construed as interfering with state laws respecting the "control, appropriation, use, or distribution" of water, and that the Secretary of the Interior, who is to operate the facilities built under the Act, must "proceed in conformity with" such state laws. 32 Stat. 390, 43 U.S.C. §§ 372, 383. In *California v. United States, supra,* this Court held that section 8 authorizes the states to control both the appropriation and distribution of water developed by the federal government under the Act, except where state laws are inconsistent with "clear congressional directives." 438 U.S. at 665-668. It is anomalous that, although this Court now recognizes the states as having broad control of water developed by *federal* projects, the Court of Appeals' decision recognizes the federal government—through the Corps—as having broad control of water developed by *state* projects.

Even though the Reclamation Act of 1902 was passed shortly after the Rivers and Harbors Act of 1899, nothing in the 1902 Act indicates that state control of water thereunder is subject to Corps approval. Nor is such an indication found in the congressional debates relating to the 1902 Act. During these debates, several congressmen emphasized that section 8 of the Act followed the principle of state control established under the "severance" and "equal footing" doctrines. Congressman Mondell of Wyoming, for example, who led the House debate, stated:

> "Section 8 follows the well-established precedent in national legislation of recognizing local and State laws relative to the appropriation and distribution of water, and instructs the Secretary of the Interior in carrying out the provisions of the act to conform to these laws.
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> * * * * *

"Every act since that of April 26, 1866, has recognized local laws and customs appertaining to the appropriation and distribution of water used in irrigation, and it has been deemed wise to continue our policy in this regard. . . .

"Now, as to State control over appropriation and distribution of water, I will say to the gentleman that there is no reasonable ground for disagreement on that point. We began to legislate in regard to the use of water in irrigation in 1866. We have legislated continuously along one line." 35 Cong. Rec. 6676, 6679.

This Court, commenting on the congressional debates, recently stated:

"Once the waters were released from the dam, their distribution to individual landowners would again be controlled by state law. As explained by Senator Clark of Wyoming, one of the principal supporters of the reclamation bill in the Senate, 'the control of the water after leaving the reservoirs shall be vested in the States and Territories through which such waters flow.' " *California v. United States, supra* at 667.[15]

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15. Congressman Sutherland, later a member of this Court, stated during the House debate:

"But it is said, further, that the laws of the State or Territory relating to the control, appropriation, and use of the water are not to be interfered with, and this will result in still further confusion. The confusion is in the mind of the objector and not in the bill. No more confusion will result from the use of these waters under the local laws and regulations of the State than have resulted by the use of other waters or property.

* * * * *

"The fact that the title to a lake is in the public, the title and ownership and control of the canals leading from it is in the proprietors of the water, and that the appropriation and use of the water is under the State law has never resulted in any sort of confusion. On the contrary, if the appropriation and use were not under the provisions of the State law the utmost confusion would prevail. The full domination and complete ownership of a tract of land is in no manner injuriously affected, because its title must be acquired and disposed of and it must be occupied and held under and in accordance with the law of the State." *Id.* at 6770.

Significantly, no suggestion was made during the congressional debates that the states' authority under section 8 was limited by the Corps' authority under the Rivers and Harbors Act of 1899. Indeed, no member of Congress even referred to the Corps' authority under the 1899 Act.

Thus, Congress has provided for broad state control of reclamation in the West, whether the reclamation is carried out by the federal government or by private enterprise. Congress provided for state control of private reclamation efforts by the 1891 and 1897 acts, which in turn reaffirmed the principle of state control established under the "severance" and "equal footing" doctrines. Congress extended this principle to federal reclamation efforts by the 1902 Act. Congress has thus consistently, and unequivocally, deferred to state laws on the subject of reclamation. Since a primary purpose of state reclamation laws is to develop the West's arid lands for economic and other purposes, Congress has thus placed itself on the side of the economic growth and development of the West.

This Court has clearly indicated that the reclamation of western lands is to be carried forth under state law. In *Kansas v. Colorado,* 206 U.S. 47 (1907), this Court stated:

> "As to those lands within the limits of the States, at least of the Western States, the National Government is the most considerable owner and has power to dispose of and make all needful rules and regulations respecting its property. *We do not mean that its legislation can override state laws in respect to the general subject of reclamation.* . . . [E]ach State has full jurisdiction over the lands within its borders, including the beds of streams and other waters." *Id.* at 92, 93. (Emphasis added.) See also *California v. United States, supra* at 663.

The historic congressional policy of providing for state control of reclamation is not consistent with the notion that the Corps

has authority to override all state reclamation schemes that affect "navigable capacity," as that term is used in the 1899 Act. As noted earlier, virtually every state reclamation effort affects "navigable capacity" in the sense that it may affect *hypothetical* commerce. See pp. 15-16, *supra*. Therefore, if the Act applies in this context, the Corps would have veto power over virtually every reclamation scheme undertaken by the western states. Concomitantly, the Corps would have broad supervisory control of the water rights systems of the western states. It would control the distribution of water to cities, farms, industries, powerplants, and other entities that receive their water supply under authority of state water rights laws. In short, the Corps would have unimagined influence over the economic growth and environmental quality of the West. This result goes far beyond that contemplated by Congress in enacting the 1899 Act.

Moreover, if the Corps has authority to veto state water allocations under the 1899 Act, it could effectively curtail state reclamation schemes that have been in existence for many years. In this case, for example, the SWP has exported waters from the Delta since 1967, and the CVP has exported such waters since 1951. Pet. Supp. App. 8. Under the lower decision, the Corps would have the power to halt further water deliveries by these projects, even though water users in central and southern California have relied on these deliveries for many decades. The Corps would thus have the power to overturn a massive water delivery system that has been a major cause of California's modern growth, and thus turn the economic clock back to an earlier age. Nothing in the 1899 Act indicates that such broad authority was to be vested in the Corps.

4. Miscellaneous Federal Laws.

In the twentieth century, Congress has enacted many other laws reaffirming the right of the western states to allocate water

among competing interests.[16] For instance, the Flood Control Act of 1944, 58 Stat. 887, which authorizes the Corps to build projects for navigation and flood control purposes, expressly provides that such projects cannot interfere with the states' primary authority to control the allocation of their waters. The Act states:

> "[I]t is hereby declared to be the *policy of Congress to recognize the interests and rights of the States in determining the development of the watersheds within their borders and likewise their interests and rights in water utilization and control* as herein authorized to preserve and protect to the

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16. See, *e.g.*, Act of June 4, 1897, § 1, 30 Stat. 36, 16 U.S.C. § 481 (authorizing use of federal lands for forest purposes); Act of February 1, 1905, § 4, 33 Stat. 623, 18 U.S.C. § 524 (granting rights-of-way for the construction of dams and reservoirs); Warren Act of February 21, 1911, § 2, 36 Stat. 928, 43 U.S.C. § 524 (authorizing sale of surplus reclamation water); Federal Power Act of June 10, 1920, §§ 9(b) and 27, 41 Stat. 1068, 1077, 16 U.S.C. §§ 302(b), 821; Boulder Canyon Project Act, § 18, 45 Stat. 1063 (1928), 43 U.S.C. § 617q; Taylor Grazing Act, 43 Stat. 1270 (1934), as amended, 43 U.S.C. § 315b; Water Conservation Act, 53 Stat. 1419 (1939), as amended, 16 U.S.C. § 590z-1(b)(2); Boulder Canyon Project Adjustment Act, 54 Stat. 779 (1940), 43 U.S.C. § 618; National Parks Act, 60 Stat. 885 (1946), 16 U.S.C. § 17j-2 (1952); Submerged Lands Act, § 3(e), 87 Stat. 30 (1933), 43 U.S.C. § 1311(e); Act of July 28, 1954, § 3(c), 68 Stat. 577 (Santa Margarita Project in California); Act of August 4, 1954, § 4(4), 68 Stat. 667 (protection of watersheds from floods); Act of July 23, 1955, § 4(b), 69 Stat. 368, 30 U.S.C. § 612(b) (providing for multiple use of the surface of tracts of public lands); Colorado River Storage Project Act, § 7, 70 Stat. 109, 43 U.S.C. § 620; Reclamation Project Act of 1939, § 4, 70 Stat. 483, 43 U.S.C. § 485h-4; Small Reclamation Projects Act of 1956, § 4(b), 70 Stat. 1044, 43 U.S.C. § 422d(b); Act of July 22, 1965, 79 Stat. 244, 42 U.S.C. § 1962 (providing for optimum development of nation's water and related land resources); Act of September 2, 1965, § 4, 79 Stat. 618, 43 U.S.C. § 616ddd (Auburn-Folsom South Project in California); Act of December 31, 1970, § 111, 84 Stat. 1821, 33 U.S.C. § 595a (authorizing construction, repair and preservation of certain public works on rivers and harbors for navigation, flood control, and other purposes).

Also, the Mexican Water Treaty, which allocates waters between the United States and Mexico, provides that the treaty shall not be construed as authorizing federal officials to "directly or indirectly alter or control the distribution of water to users" within the United States. Mexican Water Treaty, Reservation (c), U.S. Treaty, ser. no. 994, 39 Stat. 1265 (1945).

fullest possible extent established and potential uses, for all purposes, of the waters of the Nation's rivers. . . .

* * * * *

"The use for navigation, in connection with the operation and maintenance of such works herein authorized for construction, of waters arising in States lying wholly or partly west of the ninety-eighth meridian shall be only such use as does not conflict with any beneficial consumptive use, present or future, in States lying wholly or partly west of the ninety-eighth meridian, of such waters for domestic, municipal, stock water, irrigation, mining, or industrial purposes." 58 Stat. at 888, 889. (Emphasis added.)

Similarly, the Federal Water Supply Act of 1958, 43 U.S.C. § 390(b), reaffirms the congressional policy of deferring to state water allocation laws. The Act provides:

"It is declared to be the policy of the Congress to recognize the *primary responsibilities of the States and local interests in developing water supplies for domestic, municipal, industrial, and other purposes* and that the Federal Government should participate and cooperate with States and local interests in developing such water supplies in connection with the construction, maintenance, and operation of Federal navigation, flood control, irrigation, or multiple purpose projects." 43 U.S.C. § 390(b). (Emphasis added.)

An eloquent expression of the historic congressional policy is found in the legislative history supporting the McCarran Amendment, 43 U.S.C. § 666(a), which subjects the federal government to the jurisdiction of state courts for general stream adjudication purposes. According to this legislative history:

"In the arid Western States, for more than 80 years, the law has been the water above and beneath the surface of the ground belongs to the public, and the right to the use thereof is to be acquired from the State in which it is found, *which State is vested with the primary control thereof.*

* * * * *

"Since it is clear that the *States have the control of water within their boundaries,* it is essential that each and every owner along a given water course, including the United States, must be amenable to the law of the State, if there is to be a proper administration of the water law as it has developed over the years." S. Rep. No. 755, 82d Cong., 1st Sess. 3, 6 (1951). (Emphasis added.) See *California v. United States,* 438 U.S. 645, 678-679 (1978).

Indeed, the subsequent history of the Rivers and Harbors Act of 1899 provides a clear example of how Congress has deferred to state water allocation laws even with respect to the Corps' powers under that Act. Section 13 of the 1899 Act, in its original form, authorized the Corps to control waste discharges into navigable waters. 33 U.S.C. § 407; *United States v. Republic Steel Corp.,* 362 U.S. 482 (1960). In 1972, the Corps' powers under section 13 were transferred to the Administrator of the Environmental Protection Agency when Congress amended the Clean Water Act, 33 U.S.C. §§ 1251-1376. See 33 U.S.C. § 1342(a) (5). The 1972 amendments to the Clean Water Act, however, expressly provide that the Administrator's authority to control waste discharges shall not be construed to interfere with "the authority of each State to allocate quantities of water within its jurisdiction . . . ." *Id.* at § 1251(g). See *id.* at § 1370(2).[17] In short, Congress transferred part of the Corps' authority under the Rivers and Harbors Act of 1899 to the Administrator, but made clear that the Administrator's authority is subordinate to state water

17. Section 101(g) of the Clean Water Act provides:
"It is the policy of Congress that the authority of each State to allocate quantities of water within its jurisdiction shall not be superseded, abrogated or otherwise impaired by this Act. It is the further policy of Congress that nothing in this Act shall be construed to supersede or abrogate rights to quantities of water which have been established by any State." 33 U.S.C. § 1251(g).

Section 410 of the same Act provides:
"Except as expressly provided in this Act, nothing in the Act shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." *Id.* at § 1370(2).

allocations. The clear implication is that the authority retained by the Corps under the 1899 Act is also subordinate to state water allocations.

C. THE COURT SHOULD CONCLUDE EITHER THAT (1) THE RIVERS AND HARBORS ACT OF 1899 IS NOT APPLICABLE TO WATER ALLOCATIONS ADOPTED UNDER STATE WATER RIGHTS LAWS OR (2) THE ACT, IF APPLICABLE, APPLIES ONLY WHERE IMPORTANT FEDERAL NAVIGATION INTERESTS ARE SUBSTANTIALLY IMPAIRED.

We have seen, to this point, that Congress has established an historic policy of deferring to state water rights laws, a policy which has been instrumental in western economic development. Congress has also established a policy, in the Rivers and Harbors Act of 1899, of preventing obstructions to navigation. These congressional policies, as we have seen, are in conflict if the 1899 Act is construed as authorizing the Corps to control state water allocation schemes established under state water rights laws. This conflict is exacerbated rather than reconciled by the lower decision. That decision, in holding that the Corps can control state water allocations, achieves the congressional policy of preventing obstructions in navigable waters. It achieves this end, however, at the expense of the congressional policy of deferring to state water rights laws. Moreover, the decision holds that the Corps can control state water allocations that, as here, have no substantial effect on actual navigation and are essential to the development of California's semiarid lands. The decision, by literal construction of the 1899 Act, thus serves marginal navigation aims at the expense of important reclamation aims.

This Court has often held that, in resolving potential conflicts between statutes, the statutes should be interpreted, if possible, in a way that harmonizes and accomodates their purposes and meaning. See, *e.g., Cox v. Roth,* 348 U.S. 207, 208-209 (1955); 2A Sutherland, *Statutory Construction* § 53.01, at 342-343. Further, this Court has often developed common law rules

to fill the interstices of a congressional regulatory scheme. See, *e.g., Illinois v. City of Milwaukee,* 406 U.S. 91 (1972). Thus, there is ample precedent for reconciling the potential conflict between the 1899 Act and other federal laws deferring to state water rights laws. In our view, there are two possible ways in which this conflict can be reconciled, which we now set forth as alternative arguments.

1. Inapplicability of 1899 Act to State Water Allocations Adopted Under State Water Rights Laws.

Preferably, the 1899 Act should be construed as not applicable to state water allocations adopted under state water rights laws. As noted earlier, Congress has delegated broad authority to the western states to control the allocation of their waters, and there is no indication in the 1899 Act, or in its legislative history or the historical circumstances that led to its adoption, that Congress meant to abridge this delegation of authority. Under the navigation servitude, Congress can, of course, rescind or modify this delegation of authority by providing that state water allocations cannot impair the navigability of water. See, *e.g., California Oregon Power Co. v. Beaver Portland Cement Co.,* 295 U.S. 142, 159 (1935); *California v. United States,* 438 U.S. 645, 662 (1978). Therefore, if Congress determines that our suggested approach impairs important federal navigation interests, it can enact legislation to protect those interests. In enacting the 1899 Act, however, Congress did not limit state control of water allocations, and thus apparently perceived that such state control has no significent impact on important federal navigation interests.

Further, other federal remedies are available to protect important federal navigation interests affected by most state water allocations. In *Williamette Iron Bridge Co. v. Hatch,* 125 U.S. 1 (1888), as noted earlier, this Court held that, although the federal common law does not generally bar obstructions to navigable waters, the federal common law bars obstructions to navigable

waters that impair the rights and interests of other states in such waters. 125 U.S. at 15-17. Accord, *New Jersey v. New York*, 283 U.S. 336,342-343 (1931); *Pennsylvania v. Wheeling & Belmont Bridge Co.*, 54 U.S. (13 How.) 518 (1852).[18] Therefore, although the federal common law does not apply to intrastate waters, it does apply to interstate waters. If a state obstructs interstate waters in the process of reclaiming its arid lands, the federal common law provides a remedy to prevent the obstruction.

This conclusion is particularly significant here because federal navigation interests are primarily linked to interstate waters, not intrastate waters. The federal power to control navigation derives from the federal power to regulate interstate commerce, which in turn is primarily affected by interstate rather than intrastate waters. See, *e.g., Gilman v. Philadelphia*, 70 U.S. (3 Wall.) 713, 724-725 (1886); *In re Debs*, 158 U.S. 564, 586 (1895).[19] Indeed, it is questionable whether the 1899 Act even applies to waters that do not flow between states.[20] In any event, federal navigation

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18. The *Williamette Bridge* decision also held that the federal common law prohibits a state from discriminatorily regulating access to navigable waters, and from imposing duties on such access. 125 U.S. at 10. Accord, *Cardwell v. American Bridge Co.*, 113 U.S. 205, 212 (1885).

19. As this Court stated in *Gilman v. Philadelphia, supra*:

> "The power to regulate commerce comprehends the control for that purpose, and to the extent necessary, of all the navigable waters of the United States *which are accessible from a State other than those in which they lie.*" 70 U.S. at 724. (Emphasis added.)

20. The District of Columbia Circuit recently ruled that the 1899 Act is applicable only to navigable waters that form part of a "continued highway over which commerce is or may be carried on with other States or foreign countries in the customary modes in which such commerce is conducted by water." See *National Wildlife Federation v. Alexander*, 613 F.2d 1054, 1059, 1060-1061 (D.C.Cir. 1980). Under the decision, the Act is thus inapplicable to intrastate waters.

In this case, although the waters of the Delta and its tributary rivers are wholly located in California, these waters are apparently part of a continuous link with the waters of the Pacific Ocean. In this sense, the Delta is apparently part of an interstate network of waters. Under our analysis, the United States, as well as other states, may thus have the right to bring a common law action against the State of California, claiming that California's diversions are causing navigation obstructions that interfere with commerce among the states.

interests are primarily tied to interstate waters, and the federal common law already affords a remedy to prevent navigation obstructions in such waters. Therefore, federal navigation interests, at least to the extent affected by interstate waters, are fully protected even though no similar remedy is found in the 1899 Act.

2. Inapplicability of 1899 Act Except Where Federal Navigation Interests Are Substantially Impaired.

Alternatively, if the Court rules that the 1899 Act is applicable to state water allocations adopted under state water rights laws, it should accomodate and harmonize the Act's purposes with the historic congressional policy of deferring to state water allocations. These purposes and policies can be accommodated if the 1899 Act is construed as applicable only to state water allocations that substantially impair actual navigation, or otherwise render the waters unusable for commerce. Under this approach, the states cannot, in the process of reclaiming their arid lands, substantially interfere with actual commerce or destroy potential commerce without obtaining congressional authorization. As explained earlier, the water diversions in this case do not have this effect. Therefore, the diversions are not violative of the 1899 Act.

Our suggested approach accommodates the purposes of Congress' laws on the subjects of navigation and reclamation, because it protects the most important objectives of each. On the one hand, this approach prevents the states from imposing significant burdens on navigation, and thus from significantly limiting commerce. It thus protects the important federal navigation interests that underlie the 1899 Act. On the other hand, this approach enables the states to allocate water in a way that does not impair important federal navigation interests, and thus provides that the states are otherwise free to pursue reclamation efforts that are vital to the efficient use of the West's sparse water supply. This approach thus protects the states' reclamation interests without impairing important federal navigation interests.

It ensures that the major aims underlying one interest will not be ignored in favor of minor aims underlying the other.

This approach, in accommodating congressional policies relating to navigation and reclamation, is consistent with the approach which this Court has taken in other cases involving the delicate interrelationship of federal and state powers. This Court has often balanced federal and state interests in cases involving issues of federalism, whether the issues involve constitutional or statutory interpretation.[21] This balancing approach, for example, underlies the preemption doctrine. See *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947); *New York State Dept. of So-*

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21. In the field of labor law, for example, the Court has determined that, although federal law controls the interpretation of collective bargaining contracts, "state law, if compatible with the purpose of" federal law, "may be resorted to in order to find the rule that will best effectuate the federal policy." See *Textile Workers v. Lincoln Mills*, 353 U.S. 448, 456-457 (1957).

In the field of antitrust law, the Court has held that the applicability of the federal antitrust laws to the states, and to private individuals acting under a state regulatory scheme, depends on the nature of the state interest and the availability of alternative means by which that interest can be achieved. See *Parker v. Brown*, 317 U.S. 341 (1943); *Cantor v. Detroit Edison*, 428 U.S. 579, 595-598 (1976).

In the field of Indian law, the Court recently held that the applicability of state law to on-reservation Indian activities depends on "an accommodation between the interests of the Tribes and the Federal Government, on the one hand, and those of the State, on the other." See *Washington et al. v. Confederated Tribes*, 100 S.Ct. 2069, 2083 (1980).

In balancing the imperatives of the Tenth Amendment against Congress' constitutional powers over commerce, the Court has held that the states are subject to congressional laws adopted under the commerce power except where such laws infringe on activities that are within the traditional and inherent province of the states. See *National League of Cities v. Usery*, 426 U.S. 833 (1976).

In interpreting the states' sovereign immunity under the Eleventh Amendment, the Court has held that the states may waive their sovereign immunity under the Eleventh Amendment if they engage in activity regulated by Congress under its commerce powers, but that the states are not deemed to thus waive their immunity unless Congress so indicates " 'by the most express language or by such overwhelming implications from the text as [will] leave no room for any other construction.' " *Edelman v. Jordan*, 415 U.S. 651, 673 (1975). See also *Employees v. Department of Public Health & Welfare*, 411 U.S. 279, 285 (1973).

cial Services v. Dublino, 413 U.S. 405 (1973).[22] This approach has been particularly followed in determining the responsibility of federal and state agencies for control of the West's water resources. See, *e.g., United States v. New Mexico,* 438 U.S. 646 (1978); *California Oregon Power Co. v. Beaver Portland Cement Co.,* 295 U.S. 142 (1935).

Indeed, this balancing approach was taken in one of the leading cases that govern this controversy. In *California v. United States,* 438 U.S. 645 (1978), as noted earlier, this Court held that section 8 of the Reclamation Act of 1902 provides for state control of federal water uses except where this result is inconsistent with "clear congressional directives." Section 8, on its face, contains no limitation relating to congressional directives. Nonetheless, the Court, acting on California's suggestion, did not literally interpret section 8. Instead, it interpreted section 8 in light of the vast array of laws and policies which Congress has adopted in the field of reclamation. The Court thus harmonized the principle of state control, as provided in section 8, with substantive reclamation policies established by Congress in other legislation. We urge the same approach here. That is, section 10 of the 1899 Act, which prohibits obstructions to navigation, should not be read literally in the context of state water allocations. In this context, the section should be read in light of the broad congressional laws and policies applicable in the fields of navigation and reclamation, particularly the laws and policies deferring to state water allocations. This approach is the essence of federalism, for it balances and accommodates both national and local goals relating to control of water resources in the West.

Our suggested approach is consistent with this Court's only decision in which the 1899 Act has been arguably considered in

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22. Under the preemption doctrine, congressional laws are not deemed to have a preemptive effect except where such is the "clear and manifest purpose" of Congress. *Rice v. Santa Fe Elevator Corp., supra* at 230. One commentator has noted that this Court, in applying the preemption doctrine, now appears to have a "flexible conception of federal-state relations rather than one of absolute federal supremacy." See Note, "The Preemption Doctrine: Shifting Perspectives on Federalism and the Burger Court," 75 *Colum. L. Rev.* 623, 641 (1975).

the context of state water rights laws. In *United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690 (1889), an irrigation district attempted to build a dam for irrigation purposes on a non-navigable tributary of the Rio Grande River, which is a navigable river flowing through several states. Although the district "had complied with all the laws of that Territory [New Mexico] in reference to the construction of reservoirs and dams and the diversion of waters of public streams," 174 U.S. at 692-693, there is no indication that the dam had been approved by the territory in the kind of administrative or judicial proceeding which is the pivotal feature of modern state appropriation laws. It is thus unlikely that the State had the kind of interest in that case which the states now have under their appropriation laws, and which California has here. In any event, the United States brought an action to enjoin construction of the dam. This Court granted injunctive relief on grounds, repeated at several places in the opinion, that the dam threatened to "destroy" the navigability of the Rio Grande River. *Id.* at 706, 708. The Court held that Congress, in passing the Desert Land Act of 1877 and other legislation delegating authority to the western states to control their unappropriated waters, did not mean to authorize the states to "destroy" the navigability of navigable waters.[23] The Court

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23. The Court, referring to the Mining Act of 1866 and the Desert Land Act of 1877, stated:

> "Obviously by these acts, so far as they extended, Congress recognized and assented to the appropriation of water in contravention of the common law rule as to continuous flow. To infer therefrom that Congress intended to release its control over the navigable streams of the country and to grant in aid of mining industries and the reclamation of arid lands the right to appropriate the waters on the sources of navigable streams to such an extent as to *destroy* their navigability, is to carry those statutes beyond what their fair import permits. . . . To hold that Congress, by these acts, meant to confer upon any State the right to appropriate *all* the waters of the tributary streams which unite into a navigable watercourse, and so *destroy* the navigability of that watercourse in derogation of the interests of all the people of the United States, is a construction which cannot be tolerated." 174 U.S. at 706. (Emphasis added.)

also held that the Rivers and Harbors Act of 1890, which is the antecedent of the 1899 Act, was intended to ensure that the states would not be able to "destroy" the navigability of such waters.[24] Since the Court ruled that Congress had not delegated authority to states to destroy navigability, its comments on the effect of the 1890 Act appear to be dictum. In any event, the Court made clear that the states cannot "destroy" navigability in the process of reclaiming their arid lands. The decision is thus fully consistent with our alternative argument that the states cannot destroy potential commerce, or substantially impair actual commerce. The decision thus suggests, as we urge, that the Court should accomodate congressional laws and policies on the subjects of navigation and reclamation.

Finally, our suggested approach is consistent with this Court's decisions interpreting the 1899 Act. In *Wisconsin v. Illinois*, 278 U.S. 367 (1929), this Court declared: "The true intent of the Act of Congress [Rivers and Harbors Act of 1899] was that *unreasonable* obstructions to navigation and navigable capacity were to be prohibited. . . ." 278 U.S. at 413. (Emphasis added.) The Court thus made clear that the 1899 Act, even in contexts unrelated to state water allocations, applies only where there is an "unreasonable" effect on federal navigation interests. *A fortiori*, the Act applies only to state water allocations that *substantially* impair commerce.[25]

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24. The Court, referring to 1890 Act, stated:
"Evidently Congress, perceiving that the time had come when the growing interests of commerce required that the navigable waters of the United States should be subjected to the direct control of the National Government, and that nothing should be done by any State tending to *destroy* the navigability without the explicit assent of the National Government, enacted the statute in question." *Id.* at 708 (Emphasis added.)

25. In *Wisconsin v. Illinois, supra*, as well as the related case of *Sanitary District v. United States*, 266 U.S. 405 (1925), the Court dealt with the effect of the 1899 Act upon diversions by the State of Illinois for sewage disposal purposes. In *Sanitary District*, the Court held that the

3. Traditional Roles of States and Army Corps of Engineers.

Our alternative arguments are consistent with the historic roles which have been assumed by the western states and the Corps in the fields of reclamation and navigation. In response to the congressional policy of deferring to state water rights laws, the western states, as noted earlier, have developed elaborate administrative and judicial machinery to administer these laws. The machinery developed by the State of California is illustrative. In California, the State Water Resources Control Board ("State Board") conducts noticed hearings in response to water rights applications, and competing water users and others are authorized to testify and present evidence at the hearings. Cal. Wat. Code §§ 1340, 1350; 23 Cal. Admin. Code § 733(h). After the hearing, the State Board either grants or denies the application; if it grants the application, it can affix conditions on the water right to ensure the reasonable and beneficial use of water and to protect the public interest. Cal. Wat. Code §§ 1255-1257, 1390, 1391. The State Board's decision is subject to judicial review. *Id.* at § 1360. The State Board's decision typically results in an allocation of water, in that it determines the applicant's right to appropriate water

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diversions—which had not been approved by the Secretary of the Army—were in violation of section 10 of the 1899 Act, and in *Wisconsin* the Court held that—as the diversions had been subsequently approved by the Secretary—the diversions were *not* in violation of section 10. Neither case involved the allocation of water under state water rights laws, and thus neither case is fully opposite here.

Moreover, both cases involved substantial effects on actual navigation, unlike the instant case. In both cases, the State of Illinois diverted water from a tributary of Lake Michigan, thus causing *substantial* reductions in lake levels that obstructed *actual* commerce. See 266 U.S. at 423; 278 U.S. at 400, 408-409.

Finally, in both cases, the rights of other states bordering on Lake Michigan were adversely affected by the diversions. *Id.* As noted earlier, the federal common law prohibits a state from interfering with the rights of other states in interstate waters. See, *e.g., Williamette Iron Bridge Co. v. Hatch,* 125 U.S. 1, 15-17 (1888). Therefore, the results in both cases could have been sustained under common law rules. Indeed, the *Rio Grande* decision might have also been sustained under common law rules, since the Rio Grande River is an interstate river.

that otherwise would be available for competing uses. In this case, for example, the State Board issued a landmark administrative decision, Decision 1485, that authorizes the diversion of water from the Delta under several enumerated conditions, many of which are intended to protect the Delta's environment and water quality. See p. 6, *supra*. The decision thus results in a major allocation of water among economic, domestic, and environmental interests in northern, central, and southern California.

Thus, California and other western states, under their water rights laws, have historically exercised the function of distributing and allocating water among competing users and uses. They have traditionally controlled the reclamation of their arid lands. They have developed administrative and judicial machinery to carry out this function. They have developed abundant expertise on the subject of water allocations and reclamation.

Conversely, the Corps has not traditionally controlled water allocations or reclamation. It has no significant, demonstrable expertise in this area. The Corps' historic role has been confined to navigation. In view of the Corps' historically limited role, it is not likely that Congress meant for the Corps to act as the final arbiter on the subject of water allocation and reclamation in the West. Congress surely did not mean for the Corps to exercise supreme authority in an area that has been under traditional state jurisdiction and control.

Indeed, the very breadth of the Corps' authority under the 1899 Act militates against the view that the Act was intended to encumber state water allocation schemes. The broader the Corps' authority under the Act, the greater the potential conflict between the Corps' authority and the congressionally-delegated authority of the states. This Court has held on several occasions that the Corps' authority under the Act is very "broad." See *United States v. Republic Steel Corp.*, 362 U.S. 482, 487, 488, 489 (1960); *Wyandotte v. United States*, 389 U.S. 191, 201 (1967). The

Corps' jurisdiction under the Act, as noted earlier, extends to structures that affect hypothetical navigation, not just actual navigation. See p. 16, *supra*. Further, lower courts have held that the Act, in conjunction with recent federal environmental laws, authorizes the Corps to deny permits on environmental rather than navigation grounds. See *Zabel v. Tabb*, 430 F.2d 199 (5th Cir. 1970); see n. 34, *infra*. Following this approach, the Corps has adopted regulations that authorize it to deny permits whenever it believes that the "public interest" is not served by the diversions; factors related to the "public interest" under the regulations include "conservation, economics, aesthetics, general environmental concerns, historic values, fish and wildlife values, flood-damage prevention, land use, navigation, recreation, water supply, water quality, energy needs, safety, food production, and, in general, the needs and welfare of the people." 33 C.F.R. § 320.4 (a), 40 Fed. Reg. 31326-31327 (1975).

If, as the Corps' regulations provide, the Corps has authority to consider factors such as "conservation," "aesthetics," "general environmental concerns," "historic values," "food production," and related factors, it has authority to consider the same factors that the western states typically evaluate in considering water rights applications. Under this hypothesis, Congress would have effectively delegated authority to the western states and the Corps over the same subject matter. The Corps would have authority to override a state water allocation scheme by rejecting the state's evaluation of the very policy factors that underlie the scheme. If the Corps has this authority, it would effectively supplant the western states as the dominant jurisdictional body that is ultimately responsible for determining allocation of the West's water resources among competing economic, agricultural, domestic, and other interests. It would exercise a breadth of control over the economy and environment of the West far beyond that ever contemplated by Congress. Thus, the very breadth of the Corps'

authority under the 1899 Act in other contexts indicates that, in the context of state water allocations, the Act does not apply.

Importantly, we do not oppose the view that the Corps has broad authority under the Act where state water allocations are *not* involved. In this context, the Corps is usually regulating an area that is not otherwise subject to congressional regulation. The Corps' authority should be interpreted broadly in these areas, to serve the purposes of the 1899 Act in filling the federal regulatory void caused by the absence of a federal common law. On the subject of water allocations in the West, however, there is no such void. Congress has delegated broad authority to the western states over this subject matter. To broadly construe the Corps' authority in this area would thus invite a substantial conflict between congressional policies on the subjects of navigation and reclamation. It would authorize the Corps to exercise a function which has been traditionally exercised by the states, and not by the Corps.[26]

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26. If the Corps has authority to approve or disapprove a water allocation scheme adopted under state water rights laws, it would be required under other federal laws to prepare and issue an environmental impact statement (EIS) before approving such a scheme, if the Corps' approval constitutes a "major" federal action "significantly affecting the quality of the human environment." See National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. §§ 4321 *et seq.*, 4332(C). It is doubtful if Congress ever intended that water allocations established under state water rights laws would be subject to the EIS requirements provided under NEPA. Such, however, is the result of the Court of Appeals' decision.

This is not to suggest that the western states, in allocating water under their water rights laws, are or should be oblivious to environmental concerns. Indeed, California has adopted its own environmental laws applicable to such allocations, which requires the preparation and issuance of an environmental impact report prior to major state actions that significantly affect environmental quality. See California Environmental Quality Act (CEQA), Cal. Public Resources Code §§ 21000-21174. The State Board prepared and issued an environmental impact report under CEQA in conjunction with its issuance of Decision 1485, and this report fully considered environmental values both within and without the Delta. See n. 3, *supra*.

For the foregoing reasons, we conclude that the 1899 Act is not applicable to state water allocations adopted under state water rights laws or, in the alternative, is applicable only to state water allocations that destroy navigability or substantially impair actual navigation. The allocation of water among statewide interests provided by the State Board does not have any substantial effect on actual navigation in the Delta, or otherwise render the Delta's waters unusable for commerce. Therefore, the allocations are not violative of the 1899 Act.

II. THE RIVERS AND HARBORS ACT OF 1899 DOES NOT APPLY FULLY, IF AT ALL, TO DIVERSION WORKS OWNED AND OPERATED BY THE STATES.

We have argued that the 1899 Act does not apply to water diversions authorized under state water rights laws, at least where substantial federal navigational interests are not affected. We now argue, independently of that ground, that the Act is not applicable to water diversions from reclamation projects that are owned and operated by the states, at least to the same extent that the Act is applicable to other projects and activities.

Under section 12 of the 1899 Act, any "person" or "corporation" who violates the Act is subject to penal sanctions or injunctive relief. 33 U.S.C. § 406. The Act thus apparently applies only to structures or activities of a "person" or "corporation." This Court has held that a state is not a "person" or "corporation" within the meaning of federal laws unless Congress clearly indicates otherwise. See *Parker v. Brown,* 317 U.S. 341, 351 (1943). As the Court stated in *Parker*:

> "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." 317 U.S. at 351.

In *Parker,* the Court held that the federal antitrust laws, which apply only to a "person" or "corporation," see 15 U.S.C. §§ 1, 2, 4, 7, do not apply to the states. *Id.* In our view, the same result follows under the Rivers and Harbors Act of 1899, which also applies only to a "person" or "corporation."

Moreover, nothing in the 1899 Act or its legislative history indicates that Congress meant to inhibit reclamation activities undertaken by the states themselves. As noted earlier, the legislative history indicates that Congress was concerned only with bridges or other structures built by private entities, such as a "railroad company" or other "corporation." See n. 9, *supra.* Accordingly, the 1899 Act is not applicable to reclamation projects owned and operated by the states.

At the minimum, the 1899 Act should not be applied to state projects to the same extent that the Act applies to private projects. This Court has often held that federal laws are not always applicable to states on the same terms as to private entities, and has balanced federal and state interests in determining whether such federal laws are applicable to the states. In *Cantor v. Detroit Edison,* 428 U.S. 579, 595-598 (1976), this Court, refining its earlier decision in *Parker v. Brown, supra,* followed such an approach in determining whether the federal antitrust laws are applicable to the states.[27] A similar approach has been followed in determining whether a state imposes an unconstitutional burden on interstate commerce. See, *e.g., Dean Milk Co. v. Madison,* 340 U.S. 349 (1951); *Florida Lime & Avocado Growers, Inc. v. Paul,* 373 U.S. 132, 152-156 (1963). The same approach should be followed here, if it is determined that the 1899 Act applies to state projects. That is, assuming that the state project serves important public

27. In *Cantor,* the Court held that (1) the federal antitrust laws are not applicable to the states at all, and (2) the applicability of such laws to private entities acting under a state regulatory scheme depends on the nature of the state interest and the availability of alternative means by which the state interest can be achieved. 428 U.S. at 595-598.

needs, the Act should apply only if the project has a significant impact on federal navigation interests, in that it substantially impairs actual navigation or otherwise renders the waters unusable for commerce. Thus, under principles of federalism formulated elsewhere, the Court should harmonize federal laws relating to navigation and reclamation.[28]

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28. The United States noted, in its reply to our petition for writ of certiorari, that the reference to a "person" or "corporation" in section 12 appears in the first sentence, which relates to penal sanctions; this reference, it is noted, does not appear in the second sentence, which provides for injunctive relief. Brief for the Federal Respondents ("U.S. Br."), 15 n. 11. The implication, the United States argues, is that states are subject to injunctive relief but not penal sanctions. *Id.* The more likely implication, we believe, is that injunctive relief was meant to be complementary to penal sanctions, and thus that injunctive relief can be applied only to entities that are otherwise subject to penal sanctions. In any event, in light of the principles of federalism articulated in *Parker* and other cases cited above, the language of section 12 is sufficiently unclear to warrant the conclusion that the states are subject to the same constraints that apply to others.

Indeed, the United States' argument would support the conclusion that the states are subject to injunctive relief but not penal sanctions under the federal antitrust laws. The federal antitrust laws provide, similarly to the Rivers and Harbors Act of 1899, for penal sanctions against a "person" or "corporation," but make no similar reference with respect to injunctive remedies. See 15 U.S.C. §§ 1, 2, 4, 7. This Court ruled in *Parker* that the states are not subject either to penal sanctions or injunctive relief under the federal antitrust laws, thus rejecting any distinction between those two kinds of remedies.

The United States also argues that the United States' enforcement powers are not limited to those provided in the 1899 Act, citing this Court's decision in *Wyandotte Transportation Co. v. United States,* 389 U.S. 191, 202-203 (1967), and *United States v. Republic Steel Corp.,* 362 U.S. 482, 491-492 (1960). U.S. Br. 15 n. 11. In those cases, however, it was clear that Congress had meant to regulate a particular activity under the 1899 Act, but had failed to provide the necessary enforcement remedy. This Court ruled that, under these circumstances, the U.S. Attorney General has inherent enforcement powers. These cases do not suggest, however, that the Attorney General has inherent enforcement powers with respect to activity that Congress did *not* mean to regulate under the 1899 Act. The Attorney General cannot, under his inherent enforcement powers, restrain conduct that is beyond the scope of the Act. Indeed, under the Attorney General's view of his inherent enforcement powers, he would have the power to enforce the federal antitrust laws against the states, notwithstanding this Court's decisions in the *Parker* and *Detroit Edison* cases.

III. THE RIVERS AND HARBORS ACT OF 1899 IS NOT APPLICABLE TO WATER ALLOCATIONS FROM FEDERAL RECLAMATION PROJECTS BUILT AND OPERATED UNDER THE RECLAMATION ACT OF 1902.

Both the State of California and the United States argued below that the 1899 Act is not applicable to water diversions from reclamation projects built and operated by the federal government under the Reclamation Act of 1902, 32 Stat. 388, as amended, 43 U.S.C. §§ 371 *et seq.*[29] Our views have been set forth earlier in this brief in another context. See pp. 28-31, *supra.* We argued that Congress has delegated broad authority to the states to control water allocations, as evidenced *inter alia* by the states' authority to control water allocations from federal projects, and hence the states have the right to control allocations from their *own* reclamation projects. We now briefly repeat our views in the context of arguing that the states have the express right to directly control water allocations from *federal* reclamation projects, and thus that such allocations are not subject to the Corps' authority under the 1899 Act. Therefore, the Act does not apply to water exports from the federal CVP to water districts which have contracted for delivery of the water.

As noted earlier, Congress, in enacting the Reclamation Act of 1902, undertook to reclaim the West's arid lands by developing a water supply for local agricultural and other needs. Sections 2 and 10 of the Act provide that the projects are to be operated by the U.S. Water and Power Resources Service (WPRS). 43 U.S.C. §§ 411, 373. Section 8, as noted earlier, provides that state law controls the appropriation and distribution of project water except to the extent inconsistent with "clear congressional directives." *Id.* at §§ 372, 383; *California v. United States,* 438 U.S. 645

29. The State of California has an interest in whether the Corps is authorized to control water diversions from federal reclamation projects because (1) under section 8 of the Reclamation Act of 1902, the states are authorized to control such diversions, and (2) such projects provide economic and other benefiits to the state in which the projects are located.

(1978). Thus, Congress provided a comprehensive regulatory scheme that divides regulatory authority between the WPRS and the states, a division of authority that was clarified by this Court in *California v. United States, supra.* Nothing in the 1902 Act or its legislative history, as discussed earlier, indicates that Congress meant for the Corps to share in this division of authority. See pp. 28-31, *supra.* Indeed, nothing in the 1902 Act or its legislative history even makes reference to the 1899 Act, or the Corps' powers thereunder. *Id.* It is thus clear that Congress meant for the states and the WPRS to exercise exclusive regulatory control over the federal reclamation program. This result is inconsistent with the notion that the Corps has authority to control federal water diversions under this program.[30]

IV. SECTIONS 9 AND 10 OF THE RIVERS AND HARBORS ACT OF 1899 ARE NOT APPLICABLE TO STRUCTURES OR ACTIVITIES THAT DO NOT OBSTRUCT NAVIGABLE CAPACITY.

The Court of Appeals held that sections 9 and 10 of the 1899 Act authorize the Corps to prohibit structures that have no effect on navigable capacity. Pet. App. 24-27; see n. 7, *supra.* In our view, the sections do not apply to such structures, regardless of the merits of our other arguments. We have deferred our dis-

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30. The Court of Appeals stated that the Reclamation Act of 1902 is inapplicable here because that Act applies in "the context of reclamation," Pet. App. 37, thus overlooking the fact that the water diversions in this case are part of a *reclamation* scheme adopted for both federal and state projects.

The Court of Appeals, relying on this Court's decisions in *City of Fresno v. California,* 372 U.S. 627 (1963), and *Ivanhoe Irrig. Dist. v. McCracken,* 357 U.S. 275 (1958), stated that section 8 of the Reclamation Act of 1902 is primarily intended to allow state law to define the value of water rights for which compensation must be paid when the water rights are seized for reclamation purposes. Pet. App. 35. The Court misread the impact of this Court's recent decision in *California v. United States, supra,* where this Court, reversing parts of its earlier decisions in *City of Fresno* and *Ivanhoe,* ruled that section 8 provides the states with broad control of federal water allocations and uses under the 1902 Act. See 438 U.S. at 670-674.

cussion of this matter because it is not material to the outcome of this case. Our argument is that sections 9 and 10 do not apply fully, if at all, to water diversions authorized under state water rights laws, particularly where the water is diverted by a project owned and operated by the state. We concede, however, that the diversions in this case have an effect, however insubstantial, on "navigable capacity" of the Delta. Therefore, if sections 9 and 10 fully apply to water diversions authorized under state water rights laws, we concede that the sections apply here. The Court of Appeals' conclusion, to the effect that the sections apply even where navigable capacity is unaffected, is thus dictum. This dictum may have a broad impact upon western water law in other contexts, however. The dictum is also contrary to the plain meaning and statutory history of sections 9 and 10. For these reasons, we now analyze this dictum more closely even though it will not affect the outcome of this case.

A. STATUTORY ANALYSIS OF SECTIONS 9 AND 10.

As noted earlier, the first clause of section 10 prohibits any "obstruction" to "navigable capacity" in the absence of congressional authorization. 33 U.S.C. § 403. The second and third clauses of section 10, as well as section 9, provide methods for legitimizing such obstructions without the necessity of obtaining congressional approval. Section 9, which applies to structures such as bridges and dams, effectively requires approval both by the Corps and the legislature of the affected state. The second clause of section 10, which applies to structures such as wharves and piers, requires approval only by the Corps. The third clause of section 10, which applies to activities such as excavations and fills, also requires approval only by the Corps. Therefore, the first clause of Section 10 establishes a general prohibition against obstructions to navigable capacity without Congress' consent, and the other provisions qualify the general prohibition by pro-

viding methods for legitimizing such obstructions without Congress' consent. See pp. 14-15, *supra*.

The Court of Appeals, however, ruled that the other provisions, rather than qualifying the general prohibition against obstructions to navigable capacity, impose prohibitions that are in addition to the general prohibition. Pet. App. 24-27. According to the lower court, the second and third clauses are operative even though the general prohibition contained in the first clause of section 10 is not strictly operative. *Id.* The Court held that structures and activities mentioned in the second and third clauses are "presumed" to obstruct navigable capacity within the meaning of the first clause. *Id.* Under its analysis, for example, the third clause, which makes it unlawful to "alter or modify" the "condition" of navigable waters without Corps approval, prohibits any such alteration or modification regardless of whether it strictly affects navigable capacity. *Id.* Under the court's analysis, section 10 thus authorizes the Corps to control structures and activities that have no effect on navigation or navigable capacity.[31]

This Court has never determined, at least in any exhaustive analysis, whether the 1899 Act was intended to apply to obstructions which have no effect on navigable capacity. In *Wisconsin v. Illinois*, 278 U.S. 367, 413 (1929), however, this Court upheld the analysis of this issue provided by the Maine Supreme Court in *Maine Water Co. v. Knickerbocker Steam Towage Co.*, 99 Me. 473, 59 Atl. 953 (1905). In the *Knickerbocker Steam Towage* case, the Maine Supreme Court noted that the first clause of section 10 of the 1899 Act originated in section 10 of the Rivers and Harbors Act of 1890, 26 Stat. 454. See 59 Atl. at 956-957. This provision, in its original form, prohibited an "obstruction" to

31. Conversely, the district court in the case below construed the second and third clauses as inoperative unless there has been an "obstruction" of "navigable capacity" within the meaning of the first clause. Pet. Supp. App. 25-27.

"navigable capacity" unless "affirmatively authorized by law". *Id.*[32]

As the Maine Supreme Court noted, it is infeasible to require congressional approval of every structure or activity that might pose an obstacle to the nation's navigable waterways. *Id.* Congress thus provided, in section 7 of the 1890 Act, methods for legitimizing certain such obstacles short of congressional approval. *Id.* The provisions of section 7 have been re-codified in sections 9 and 10 of the 1899 Act. *Id.* Specifically, in the part of section 7 now found in section 9 of the 1899 Act, Congress provided that any "bridge" or "causeway" is lawful if approved *both* by Congress and the Secretary of the Army, although Congress' consent is not necessary if the structure is approved by the legislature of the affected state. 26 Stat. 454 (1890).[33] Second, in the part of section 7 now found in the second clause of section 10 of the 1899 Act, Congress provided that any "wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures" is lawful if approved by the Secretary of the Army. *Id.* Third, in the part of section 7 now found in the third clause of section 10 of the 1899 Act, Congress provided that any activity resulting in an alteration or modification of the waters, such as an excavation or fill, is lawful if approved by the Secretary of the Army. *Id.*

Once the 1899 Act is analyzed in terms of the meaning of the 1890 Act, the meaning of sections 9 and 10 is eminently clear. The first clause of section 10—which originated in section 10 of the 1890 Act—generally prohibits any interference with "navigable capacity" without congressional approval. The other clauses of section 10, as well as section 9—which were originally grouped in section 7 of the 1890 Act—provide methods for legitimizing

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32. In the 1899 Act, the phrase "affirmatively authorized by law," as originally contained in section 10, was changed to "affirmatively authorized by Congress" to make clear that an obstruction is not lawful under section 10 simply because it is approved by a state. *Wisconsin v. Illinois, supra* at 412.

33. In enacting the 1899 Act, Congress added a "dam" and "dike" to the category of structures now listed in section 9.

such interferences without the necessity of obtaining congressional approval. Section 9 provides that structures such as bridges and dams, which often have a *major* impact on navigability, are lawful if approved *both* by the state legislature and the Secretary of the Army. The second clause of section 10 provides that structures such as wharves and piers, which often have a lesser impact on navigability, are lawful if approved simply by the Secretary of the Army; the consent of Congress and the state legislature is not necessary to legitimize such structures. Finally, the third clause of section 10 focuses on *non-structural* activities, such as excavations and fills, that also usually have a lesser impact on navigability; it legitimizes such activities if such are approved by the Secretary of the Army. The congressional scheme is thus lucid and logical. It forbids any impairment of navigable capacity without congressional approval except that (1) certain types of *major* structures can be approved jointly by states and federal officials and (2) certain types of lesser structures and activities can be approved simply by federal officials. See *Wisconsin v. Illinois, supra* at 412-413; *United States v. Republic Steel Corp., supra* at 486-487; *Maine Water Co. v. Knickerbocker Steam Towage Co., supra* at 956-957.

It is thus clear, as the Maine Supreme Court ruled in the *Knickerbocker Steam Towage* case, that the second and third clauses of section 10, as well as section 9, are "qualifications" of the general prohibition contained in the first clause of section 10. See 59 Atl. at 957. These qualifications limit the scope of the general prohibition against obstructions to navigable capacity, rather than impose additional prohibitions beyond the scope of the general prohibition. The purpose of the qualifications is to provide a means to obtain administrative relief from the Act's broad constraints without enlisting the aid of Congress, not to impose additional constraints. The qualifications are exceptions to the general rule that navigable waters must be

unobstructed. As exceptions to the general rule, they cannot apply to activity that is beyond the scope of the rule.

Therefore, the qualifications in sections 9 and 10 are not applicable unless there has been an interference with "navigable capacity" within the meaning of the first clause of section 10. If such an interference exists, the Corps has authority to sanction the structure or activity. In the absence of such an interference, the Act simply does not apply, and the Corps has no jurisdiction in the matter. In short, the Corps can *authorize* that which is otherwise prohibited by the Act, but—contrary to the Court of Appeals' decision—cannot *prohibit* that which is otherwise beyond the scope of the Act.

B. CONSTITUTIONAL ANALYSIS OF SECTIONS 9 AND 10.

The above conclusion is supported, and indeed compelled, by this Court's decisions respecting federal and state powers over navigable waters. As noted earlier, this Court has often held that, under the "equal footing" doctrine, the states have broad control of their navigable waters, subject to the paramount federal power to protect navigability of navigable waters. See *e.g., Pollard's Lessee v. Hagan,* 44 U.S. (3 How.) 212, 224-229 (1845); *Shively v. Bowlby,* 142 U.S. 1, 49-50 (1894); *United States v. Oregon,* 295 U.S. 1, 14 (1935); *United States v. Texas,* 339 U.S. 716-717 (1950). Certainly the federal power to protect navigability is, by definition, unaffected where a structure or activity has no effect on navigable capacity. Therefore, sections 9 and 10 would be unconstitutional if construed as applicable to structures or activities that have no such effect. It follows that the second and third clauses of section 10, as well as section 9, must be construed as applicable only to structures or activities that obstruct navigable capacity within the meaning of the first clause of section 10. They limit the scope of the general prohibi-

tion against navigation obstructions, rather than impose prohibitions against structures or activities that have no such effect.[34]

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34. The Court of Appeals also ruled that recent federal environmental laws expand the Corps' authority under the Rivers and Harbors Act of 1899 by authorizing the Corps to deny permits thereunder on solely environmental rather than navigational grounds. Pet. App. 16 n. 13, 22. Such authority, the court ruled, was conferred by the Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-666(c) (1976), and the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4347 (1970 and Supp. V 1975). Pet. App. 16 n. 13, 22. A similar result was reached by the Fifth Circuit in *Zabel v. Tabb*, 430 F. 2d 199, 213-214 (5th Cir. 1970), *cert. denied* 401 U.S. 910 (1971).

We do not address the question whether these federal environmental laws authorize the Corps to deny a permit on solely environmental grounds, since this case does not involve the denial of a permit. It is clear from the above constitutional analysis, however, that these federal environmental laws cannot constitutionally authorize the Corps to exercise jurisdiction over structures and activities that have no navigational impacts, at least to the extent that the Corps acts contrary to state law. Therefore, whether or not these federal environmental laws authorize the Corps to deny permits on non-navigational grounds, they cannot be construed as authorizing the Corps to exercise permit-issuing authority over state-approved structures and activities that have no navigational impacts. In other words, if a structure has no navigational effect, the builder is not required to seek Corps approval; if the structure has a navigational effect, the builder must seek Corps approval, and the question remains whether the Corps can deny the permit on grounds unrelated to the navigational effect.

CONCLUSION

In keeping with the federal tradition that molded our constitutional order, the Court should interpret the Rivers and Harbors Act of 1899 in a way that accommodates the historic congressional policy of deferring to water allocations based on state water rights laws. This historic policy has been a pivotal feature in the reclamation of the arid western lands, which has been a major cause of the West's economic advancement. Under our suggested accommodation, the 1899 Act either does not apply in this context at all, or alternatively applies only to the extent that the water allocations substantially impair actual commerce or otherwise render the waters unusable for commerce. This policy is not consistent with the notion that the Corps has broad authority to override water allocations adopted under state water rights laws.

As Justice Holmes has commented, the life of the law is not logic but experience. See Holmes, *The Common Law* 1 (1881). Under our nation's historical experience, the control of water allocations in the West has been the responsibility of the states whose economies and environments are most affected, not the Corps. This historical experience is the lamp that illuminates the issues raised here. We urge reversal of the Court of Appeals' decision.

Respectfully submitted,

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In the Supreme Court of the United States

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v.

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AND

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BRIEF FOR THE FEDERAL RESPONDENTS

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BRIEF FOR THE FEDERAL RESPONDENTS

QUESTIONS PRESENTED

1. Whether the Rivers and Harbors Act of 1899 includes an implied right of action enabling private parties to seek civil enforcement of Section 10 of the Act.

2. Whether Section 10 of the Rivers and Harbors Act of 1899 applies to a state water allocation project that diverts water from a navigable channel where the diversion alters or modifies the course, location, condition, or capacity of the channel.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5-62)[1] is reported at 610 F.2d 581. The opinion of the district court (Pet. App. 63-129) is reported at 400 F.Supp. 610.

JURISDICTION

The judgment of the court of appeals was entered on October 31, 1979. A petition for rehearing was denied on January 17, 1980. The petition in No. 79-1252 was filed on February 13, 1980, and granted on October 6, 1980. The petition in No. 79-1502 was filed on March 17, 1980, and granted on October 6, 1980. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTES INVOLVED

Section 10 of the Rivers and Harbors Act of 1899, as amended, 33 U.S.C. 403, provides:

> The creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States is prohibited; and it shall not be lawful to build or commence the building of any wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures in any port, roadstead, haven, harbor, canal, navigable river, or other water of the United States, outside established harbor lines, or where no harbor lines have been established, except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army; and it shall not be lawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of, any

[1] All "Pet. App." references in this brief refer to the separately bound appendix to the petition filed by Kern County Water Agency *et al.* in No. 79-1502.

port, roadstead, haven, harbor, canal, lake, harbor or refuge, or inclosure within the limits of any breakwater, or of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

Section 12 of the Rivers and Harbors Act of 1899, as amended, 33 U.S.C. 406, provides:

> Every person and every corporation that shall violate any of the provisions of sections 401, 403, and 404 of this title or any rule or regulation made by the Secretary of the Army in pursuance of the provisions of section 404 of this title shall be deemed guilty of a misdemeanor, and on conviction thereof shall be punished by a fine not exceeding $2,500 nor less than $500, or by imprisonment (in the case of a natural person) not exceeding one year, or by both such punishments, in the discretion of the court. And further, the removal of any structures or parts of structures erected in violation of the provisions of the said sections may be enforced by the injunction of any district court exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States.

Section 17 of the Rivers and Harbors Act of 1899, as amended, 33 U.S.C. 413, provides:

> The Department of Justice shall conduct the legal proceedings necessary to enforce the provisions of sections 401, 403, 404, 406, 407, 408, 409, 411, and 412 of this title; and it shall be the duty of United States attorneys to vigorously prosecute all offenders against the same whenever requested to do so by the Secretary of the Army or by any of the officials hereinafter designated, and it shall furthermore be the duty of said United States attorneys to report to the Attorney General of the United States the action

taken by him against offenders so reported, and a transcript of such reports shall be transmitted to the Secretary of the Army by the Attorney General; and for the better enforcement of the said provisions and to facilitate the detection and bringing to punishment of such offenders, the officers and agents of the United States in charge of river and harbor improvements, and the assistant engineers and inspectors employed under them by authority of the Secretary of the Army, and the United States collectors of customs and other revenue officers shall have power and authority to swear out process, and to arrest and take into custody, with or without process, any person or persons who may commit any of the acts or offenses prohibited by the said sections, or who may violate any of the provisions of the same: *Provided*, That no person shall be arrested without process for any offense not committed in the presence of some one of the aforesaid officials: *And provided further*, That whenever any arrest is made under such sections, the person so arrested shall be brought forthwith before a magistrate, judge, or court of the United States for examination of the offenses alleged against him; and such magistrate, judge, or court shall proceed in respect thereto as authorized by law in case of crimes against the United States.

STATEMENT

1. The California Water Project (CWP) was constructed primarily for the purpose of transporting water from the northern portions of California, where precipitation is comparatively abundant, to the more arid southern half of the State, where most of the population and irrigable lands are located. The CWP consists of a series of water storage and transportation works and associated facilities. Among other things, the CWP stores runoff behind dams in the Sacramento River watershed. As those waters are needed, they are released and flow down the Sacramento River to the Delta, a low-lying area of islands and interconnecting channels at the con-

fluence of the Sacramento and San Joaquin Rivers, located to the east of San Francisco Bay.[2] There, the released waters merge with other waters in the Delta. Portions of the augmented Delta waters are then pumped out for transportation to the central and southern regions of the State (Pet. App. 8-9).

The CWP consists of both federal and state components. The federal component is known as the Central Valley Project (CVP) and is administered by the Secretary of the Interior through the Bureau of Reclamation (Pet. App. 8).[3] The essential operations and features of the massive and complex CVP were described by this Court in *Ivanhoe Irrigation Dist.* v. *McCracken*, 357 U.S. 275, 279-287 (1958), and *United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725, 727-730 (1950). The state component of the CVP is known as the State Water Project (SWP) and is operated by California Department of Water Resources (Pet. App. 9).

In the courts below, the operations of both federal and state components were at issue. The federal facility—the Tracy Pumping Plant—began operations in 1951 (Pet. App. 69). Located on an inlet channel of the Old River at the southern margin of the Delta, this plant lifts Delta waters into the northern terminus of the Delta-Mendota Canal, a 115-mile canal extending from the Delta to the Mendota Pool in the Central Valley (*id.* at 9, 69-70).

The SWP depends upon the Delta Pumping Plant, a state-operated facility located approximately two miles west of the Tracy Pumping Plant, to lift the waters diverted from the Delta to the northern terminus of the state-owned and operated California Aqueduct, which

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[2] A map of the Delta was reproduced as an exhibit to the district court's opinion (Pet. App. 130, Exh. A).

[3] The Bureau of Reclamation was recently renamed the "Water and Power Resources Service," but the term "Bureau of Reclamation" will be used in this brief because that is the term used in the opinions below.

carries the water to southern California (Pet. App. 69-70). The Delta Pumping Plant, which presently has an installed pumping capacity of 6,300 cubic feet per second, began operations in late 1967 (*ibid.*). Waters to be pumped through the Delta Pumping Plant are temporarily stored in an artificial body of water known as the Clifton Court Forebay. The Forebay diverts water from the Delta through an intake structure consisting of five radial gates that connect the Forebay to West Canal. West Canal in turn is connected to the Old River (*id.* at 71).

Under the present system, the quality of the released waters is significantly degraded when they mingle with other Delta waters. To improve the quality of waters transported through the Delta-Mendota Canal and the California Aqueduct, the State has proposed to construct a 42-mile canal around the eastern margin of the Delta to carry high quality water directly from the Sacramento River to the Tracy and Delta Pumping Plants. This proposed canal, known as the Peripheral Canal, would also release fresh water at various points along its route to improve water quality within the Delta (Pet. App. 71). Although the federal Bureau of Reclamation participated to a limited degree in the planning of the canal, Congress has not authorized federal participation in the construction of the Peripheral Canal, nor has it appropriated any construction funds for the project.

2. Respondents Sierra Club, Hank Schramm, and William Dixon, together with another environmental organization and another individual (hereinafter collectively referred to as "plaintiffs")[4] filed this action against the federal and state defendants in 1971 in the United States

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[4] One of the three individual plaintiffs was dropped from the Amended Complaint (R. 444), and plaintiff Friends of the Earth was later found, by the court of appeals, to lack standing to sue (Pet. App. 25-26). "R." refers to the Clerk's Record filed in the court of appeals.

District Court for the Northern District of California.[5] The complaint as amended alleged that the Sierra Club represented, *inter alia*, members who used the waters of the Delta for recreational purposes, and that plaintiffs Schramm and Dixon owned or operated businesses in the Delta, a commercial fishing venture and a duck club, respectively (A. 14a-15a).[6] It further alleged that present diversions of waters from the Sacramento River and the Delta effected by the Tracy and Delta Pumping Plants have degraded water quality in the Delta and San Francisco Bay, and that proposed future diversions by the Peripheral Canal would further degrade the water quality there (A. 16a-18a). This degradation in water quality was alleged to have adverse effects upon wildlife, fisheries, and recreation (*ibid.*). Plaintiffs contended that the existing and proposed diversions violated or would violate, various statutes, including Sections 9 and 10 of the Rivers and Harbors Act of 1899 (the "1899 Act"), 33 U.S.C. 401 and 403, and the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.* (A. 23a-28a, 33a-37a).

Plaintiffs sought a judgment declaring that the defendants had not complied with applicable statutes and enjoining further operation or construction of the water diversion facilities until such time as the defendants satisfied all legal requirements (A. 45a-48a). Compliance with the law was alleged to require, *inter alia*, (1) that the State and the Bureau of Reclamation refrain from operating the pumping plants at issue until both the consent of Congress and the approval of the Secretary of the Army and the Chief of Engineers were obtained for those operations and (2) that the Secretary of the

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[5] The federal defendants were the Secretary of the Interior, the Commissioner of the Bureau of Reclamation, the Secretary of the Army, the Chief of Engineers of the Army Corps of Engineers, and the Division Engineer of the Corps' South Pacific Division (Pet. App. 68).

[6] "A." refers to the joint appendix to the briefs filed in this Court.

Army and the Chief of Engineers not give such approval until they had been furnished with certain reports from the Secretary of the Interior concerning the effects of the water diversion on fish and wildlife and other features of the natural environment (*ibid.*).

In response to the complaint, the federal defendants asserted, *inter alia*, that the operations of the Tracy Pumping Plant did not violate Sections 9 and 10 of the 1899 Act or NEPA (A. 78a, 79a). With regard to the Peripheral Canal, the federal defendants argued that any ruling on this issue would be premature because the Secretary of the Interior had not yet submitted any feasibility report concerning the project to Congress and that any such feasibility report would be accompanied by an adequate environmental impact statement (EIS) (A. 75a-77a, 81a).[7] In its answer (A. 50a-69a), the State denied that the operation of its facilities violated any laws. Subsequently, the district court entered orders permitting the Tulare Lake Basin Water Storage District, the Kern County Water Agency, the Metropolitan Water District of Southern California and the Santa Clara Valley Water District (the Water Agency petitioners) to intervene as defendants (Pet. App. 6 n.3). The Kern County Water Agency and the Metropolitan Water District of Southern California were the primary purchasers of water pumped through the State's Delta Pumping Plant, contracting, respectively, for the purchase of more than 1.1 million acre feet and 2 million acre feet of water annually (A. 90a).

Following a trial on the merits, the district court entered findings of fact and conclusions of law (Pet. App. 63-129).[8] First, the court held that private persons are

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[7] Section 9(a) of the Reclamation Project Act of 1939, 43 U.S.C. 485h(a), provides that authorization for a federal reclamation project is automatically obtained when the Secretary of the Interior finds it to be feasible and submits a favorable feasibility report to the President and to Congress.

[8] The court designated this the liability phase of a bifurcated proceeding (Pet. App. 64), but no trial constituting the "relief

entitled to bring actions seeking to enforce Sections 9 and 10 of the 1899 Act (*id.* at 72-80).[9] Second, the court ruled that the Peripheral Canal, if constructed, would require permits from the Secretary of the Army through the Corps of Engineers, pursuant to Sections 9 and 10 of the 1899 Act (*id.* at 81-83, 91-93). Third the court found that the pumping of the Tracy and Delta Pumping Plants caused net flow reversals and lowering of water levels in Delta waters, thereby reducing their navigable capacity (*id.* at 88-93); and it concluded that the federal and state defendants had thus violated Section 10 of the 1899 Act by failing to obtain permits for such diversions from the Secretary of the Army (*id.* at 84-88, 93-104). Finally, the court held that any Section 9 or 10 permit issued by the Corps must be preceded by an adequate EIS (*id.* at 108-121). Plaintiffs' remaining causes of action were dismissed (*id.* at 129).

An order granting injunctive relief was entered on December 18, 1975 (R. 1078-1081). The order directed the federal and state defendants to obtain, within a prescribed period of time, Section 10 authorization to operate the Tracy and Delta Pumping Plants, and it required that any such permit be preceded by an EIS (Pet. App. 6; R. 1079-1080).[10] The court further directed that no work on the Peripheral Canal may be commenced until Section 9 and 10 permits are obtained and that any such

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phase" (*ibid.*) was ever held. Hence plaintiffs never established any particularized damages resulting from the legal violations found (see Pet. App. 24 n.19).

[9] Before trial the court had orally denied the federal defendants' motion to dismiss (R. 55) without prejudice to renew; following trial on the merits the federal defendants renewed the motion, arguing *inter alia*, that the 1899 Act conferred no private right of action.

[10] We are advised by the Sacramento District of the Corps of Engineers that, although the State takes the position that Section 10 does not apply to its Delta Pumping Plant, the State, as a precautionary measure, filed an application for a Section 10 permit on October 21, 1975. The Corps has been processing the application and has published the final EIS on the permit application. 45 Fed. Reg. 58959 (1980).

permits must be preceded by preparation of an adequate EIS (Pet. App. 6; R. 1080-1081). All of the defendants appealed from this order.[11]

3. The court of appeals (Pet. App. 5-62) affirmed in part and reversed in part. First, although finding "no hard and precise indication of a congressional intent to create or deny a private remedy" under Section 10 of the 1899 Act (Pet. App. 12), the court concluded (*id.* at 22), that "private parties who suffer special injuries because of unauthorized activities affecting the navigable capacity of our Nation's waters may sue to enforce the permit requirements of [S]ection 10." In so holding, the court found that the plaintiffs below are members of a class for whose especial benefit Congress had enacted Section 10 (*id.* at 12-14) and that implication of a private remedy is both consistent with the purposes of the Act and complementary to its enforcement (*id.* at 18-20). The court acknowledged (*id.* at 15-16) that Section 12 of the 1899 Act, 33 U.S.C. 406, in conjunction with Section 17, 33 U.S.C. 413, expressly placed the duty of enforcing the statute upon the Attorney General and the Department of Justice and that normally such express statutory provisions would imply that no other means of enforcement are intended by Congress. The court concluded, however (Pet. App. 16-17) that this customary rule of construction was inapplicable to the 1899 Act because this Court has consistently construed the Act's language in a manner aimed at effectuating the underlying statutory policies.

Second, the court of appeals ruled that the Sierra Club and the individual plaintiffs had standing to maintain this action (Pet. App. 23-25). The court further ruled, however (*id.* at 25-26), that plaintiff Friends of the Earth had failed to make the requisite showing of injury to any of its individual members. Accordingly, the court directed the district court to dismiss the complaint as to Friends of the Earth (*ibid.*).

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[11] None of the appellants attacked the district court's holdings with respect to the Peripheral Canal.

Third, the court of appeals affirmed the ultimate holding of the district court that Section 10 applied to the pumping operations at issue (Pet. App. 26-33). While it did not reverse the district court's findings that the operations produced obstructions to the navigable capacity of Delta waters, in violation of the first and third clauses of Section 10, it declined to rest its holding as to the application of Section 10 upon them. Instead, stating that "the facts in this case should be analyzed from the standpoint of whether there has been any modification or alteration of the condition or capacity of a navigable stream, rather than first determining whether there has been an obstruction to navigable capacity" (*id.* at 28), the court concluded (*id.* at 39) that the district court's finding that the pumping operations altered the condition of the navigable waters in the Delta was sufficient to bring those operations within the third clause of Section 10, which makes it unlawful, without authorization from the Secretary of the Army, "to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of * * * the channel of any navigable water of the United States * * *." The court of appeals rejected (Pet. App. 33-39) the argument, made by the State and the intervenor-defendants, that various other federal statutes, primarily in the area of reclamation, which contain generalized statements announcing a congressional policy of federal noninterference in state water laws or with state water rights, released the State from compliance with the specific requirements of Section 10.

Fourth, the court of appeals reversed the district court with respect to the operations of the federal Tracy Pumping Plant (Pet. App. 39-49), finding that those works had been affirmatively authorized by Congress and were thus exempt from the requirements of Section 10.

The court of appeals agreed (Pet. App. 50-51) with the district court, however, in its rejection of the State's argument that a Section 10 permit issued by the Corps for the cutting of a levee to facilitate the construction

of an inlet control structure for Clifton Court Forebay constituted an authorization of the Delta pumping plant in its entirety. The court of appeals also agreed (*id.* at 51-52) that a Federal Power Commission license for portions of the SWP did not exempt those facilities from Section 10 requirements.

Finally, noting that current regulations of the Corps of Engineers exempted structures completed before December 18, 1968, from the permit requirements of Section 10, where the works do not interfere with navigation, the court (Pet. App. 53-54) remanded the case to the district court for a determination whether the State's facilities are exempt under the regulation and, if so, whether such regulatory exemptions are permissible under the 1899 Act.

SUMMARY OF ARGUMENT

I

1. The question whether the Rivers and Harbors Act of 1899 includes an implied right of action enabling private parties to seek civil enforcement of Section 10 of the Act is purely a question of legislative intent. *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 15 (1979); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 568 (1979). This Court has identified four factors as indicative of legislative intent in this context. *Cort* v. *Ash*, 422 U.S. 66, 78 (1975). It has cautioned, however, that they are not of equal weight. *Touche Ross & Co.* v. *Redington*, *supra*, 442 U.S. at 575-576, 578.

In this case, the critical first two *Cort* v. *Ash* factors reveal that Congress did not intend to include a private remedy in the 1899 Act, and it is thus irrelevant whether, applying the last two factors, a court might deem a private remedy a useful adjunct to the federal scheme or consider the subject matter to be traditionally one of concern to the states.

2. First, rather than representing a statute enacted for the benefit of a special class, the 1899 Act is a classic

example of a statute enacted for the benefit of the public at large; and this Court has been generally reluctant to find a private right of action implied in such a statute. See *Cannon* v. *University of Chicago*, 441 U.S. 677, 690-691 & n.13 (1979).

Second, the intent of Congress to preclude enforcement of Section 10 by private parties is revealed in the Act's express enforcement provisions, which state that the Department of Justice shall conduct the legal proceedings to enforce the statute (33 U.S.C. 413) and which specifically authorize the Attorney General to bring proceedings for injunctive relief to enforce Section 10 and other provisions (33 U.S.C. 406). This evidence of intent is reinforced by legislative history: for example, in a predecessor bill, Congress considered a provision that would allow suits by private parties to recover penalties for violations of the statute, but that provision was dropped and was not included in either the Rivers and Harbors Act of 1890, upon which the 1899 Act was based, or in the 1899 Act itself.

The court of appeals acknowledged that the enforcement provisions of the 1899 Act are couched in language that would normally indicate an intent to deny a private remedy, and it found in the legislative history no distinct indication of an intent either to create or to deny a private remedy. It implied a private right of action because it felt bound to read the Act broadly in order to effectuate its purposes, and because, in the court's view, permitting suits such as this would be useful. Such an analysis is incorrect under this Court's precedents concerning implied rights of action, and the faulty analysis has led to an incorrect conclusion.

II

1. It is generally agreed that the power of the states to determine water rights and uses within their borders is limited by a paramount federal power to ensure the navigability of the navigable waters of the United States.

Section 10 of the 1899 Act was enacted in the exercise of that federal power. The first clause generally proscribes unreasonable obstructions to navigable capacity unless the consent of Congress is obtained. The second and third clauses describe certain structures and types of activities in or affecting navigable waters that cannot be undertaken without the permission of the Secretary of the Army, acting on the recommendation of the Chief of Engineers. In cases coming within these second and third clauses, it is for the Secretary, acting through the Corps of Engineers, to determine whether the structure or activity would constitute an unreasonable obstruction to navigable capacity requiring congressional consent.

Notwithstanding the fact that the Delta pumping plant comes within the literal terms of Clause 3, *i.e.*, that its operations "alter or modify the * * * condition or capacity of * * * the channel of [a] navigable water," petitioners contend that it does not require a permit from the Secretary of the Army. Only where there is a substantial impairment of actual navigation, they assert, can Section 10 apply to any component of a state water allocation system operating pursuant to state law. This confuses the standard for determining when an operation may be enjoined for lack of congressional consent (which requires a showing of substantial impairment of navigable capacity), with the standard for determining when the Secretary of the Army, in the exercise of his permit jurisdiction under the second and third clauses, must review a project so as to ensure that it does not have effects that would make it unlawful for lack of congressional consent. Decisions of this Court on which petitioners rely for their standard involve injunctions against activities, including water diversions, which are unlawful per se under the first clause because they amount to an obstruction of navigable capacity requiring the consent of Congress. Those same cases refute the separate and broader contention of the State that states are not covered by the 1899 Act at all.

2. In making their argument that the 1899 Act has only limited application to state water allocation schemes, petitioners rely on provisions in other statutes in which Congress has either (1) indicated its recognition that states are at liberty to define water rights however they wish, *e.g.*, by adhering to the common law riparian rights doctrine or by adopting the doctrine of prior appropriation or (2) stated an intent not to allow the terms of the statute in question to interfere with existing state control of water rights. These provisions are not, however, inconsistent with application of the 1899 Act to water diversions made pursuant to state water allocation programs. States are free to make basic water allocation decisions, so long as they do not produce unreasonable obstructions to the navigable capacity of waters and so long as they secure a permit from the Secretary of the Army to whom Congress has given the responsibility of determining whether activities affecting the condition of navigable waters threaten to create such obstructions.

Of course, some alterations of the condition of navigable waters may be so minimal as not even to require scrutiny by the Corps under Section 10, but where, as here, it is conceded that the alterations have an impact on navigable capacity, it is unnecessary to determine whether the terms of the clause may be enforced to their literal limit.

3. Petitioners' argument amounts to a request that this Court modify the scheme clearly set out in Section 10 of the 1899 Act so as to limit its application where states are concerned. It does not draw support from preemption cases involving other areas of law, for none of those holds that a state may authorize what is clearly forbidden by a statute. Moreover, the argument is contrary to the familiar rule of construction that repeals by implication are not favored; and this rule is especially compelling where, as in the case of the 1899 Act, Congress has subsequently acted in several instances to limit the application of Section 10 and has done so in express terms.

ARGUMENT

I. THE RIVERS AND HARBORS ACT OF 1899 DOES NOT INCLUDE AN IMPLIED RIGHT OF ACTION ENABLING PRIVATE PARTIES TO SEEK CIVIL ENFORCEMENT OF SECTION 10 OF THE ACT

A. Whether Such a Right Exists is Solely a Question of Legislative Intent

The question whether a statutory cause of action exists is one of statutory construction, whether the action is said to be created expressly by a statute or created by statutory implication. *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 15 (1979); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 568 (1979); *Cannon* v. *University of Chicago*, 441 U.S. 677, 688 (1979). This Court has identified four factors as relevant to a determination whether, in the case of a statute that does not expressly so provide, a cause of action in favor of private parties predicated on a violation of the statute may be implied. *Cannon* v. *University of Chicago, supra*, 441 U.S. at 688, citing *Cort* v. *Ash*, 422 U.S. 66, 78 (1975). Briefly, those factors are (1) whether the plaintiffs come within a class of persons for whose special benefit the statute was enacted; (2) whether there is any express or implicit indication of congressional intent to create or deny such a cause of action; (3) whether the existence of a right to bring such action would be consistent with the purposes of the legislative scheme; and (4) whether the cause of action involves a matter essentially of concern to the states and is traditionally relegated to state law, so that it would be inappropriate to infer a federal cause of action. *Cort* v. *Ash, supra*, 422 U.S. at 78.

Because the essential question is what Congress intended, the factors are not of equal significance, however. As this Court has recently had occasion to note (*Transamerica Mortgage Advisors, Inc.* v. *Lewis, supra*, 444 U.S. at 15-16; *Touche Ross & Co.* v. *Redington, supra*, 442 U.S. at 575-576, 578), where the language and legislative his-

tory of a statute indicate that Congress did not intend to create a private remedy, it is irrelevant whether a court might deem a private remedy a useful adjunct to the legislative scheme or whether the subject matter of the action is not one traditionally of concern to the states.

B. The Enforcement Provisions of the 1899 Act Evidence an Intent to Commit Enforcement of the Statute Exclusively to the United States

1. Analysis of the language and legislative history of the Rivers and Harbors Act of 1899 reveals that Congress did not intend to create a federal cause of action in favor of private parties under Section 10 of the Act, 33 U.S.C. 403.

We begin with the statutory language. *Touche Ross & Co.* v. *Redington, supra*, 442 U.S. at 568; *Cannon* v. *University of Chicago, supra*, 441 U.S. at 689. Section 10 of the 1899 Act prohibits obstructions to the navigable capacity of waters of the United States without congressional authorization and prohibits the construction of certain types of structures in those waters or any excavation, filling, or other alteration of "their course, location, condition or capacity" without the authorization of the Secretary of the Army on the recommendation of the Chief of Engineers. In Sections 12 and 17 of the Act, 33 U.S.C. 406 and 413, Congress specified the means of enforcing Section 10. Section 12 sets out criminal penalties for those who violate the terms of Section 10, and it also provides that "the removal of any structures or parts of structures erected in violation of the provisions of the said sections may be enforced by the injunction of any district court exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States." Section 17 provides that the "Department of Justice shall conduct the legal proceedings to enforce the provisions" of the various prohibitory sections of the 1899 Act. Section 10 of the Act, 33 U.S.C. 403, is one of those specified sections.

Where a statute thus contains a specific provision governing its enforcement and does not provide for enforcement by private parties, it may be presumed that Congress intended to exclude private remedies. *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412, 419-420 (1975); *National R.R. Passenger Corp.* v. *National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974). Accordingly, here we may at least preliminarily conclude that in the 1899 Act, Congress intended to create a public cause of action enforceable by the Department of Justice but not by private parties such as plaintiffs in this suit.

This presumption, of course, will yield to "clear contrary evidence of legislative intent" (*National R.R. Passenger Corp.* v. *National Ass'n of R.R. Passengers, supra*, 414 U.S. at 458), but such evidence is absent here. Indeed, if anything, the legislative history of the 1899 Act discloses a congressional intent to deny a private right of action.

The provisions of the 1899 Act dealing with obstructions derive ultimately from a proposal made by the Chief of Engineers and transmitted to Congress by the Secretary of War in 1877. See, *United States* v. *Republic Steel Corp.*, 362 U.S. 482, 499-500 (1960) (Harlan, J., dissenting). Bills based on this recommendation were repeatedly introduced and reported favorably in the years prior to 1890, but they failed to pass both chambers. In 1888, during the first session of the 50th Congress, S. 2 was the navigable waters bill pending before Congress, and Section 2 of that bill contained a provision substantially similar to the text of Section 10 of the 1899 Act. The enforcement provision in the bill, Section 5, originally provided as follows:

> Sec. 5. That every person, persons, or corporation offending against the provisions of this act shall, for each and every such offense, forfeit and pay a penalty of $250 besides such other sum as may be found in any action for the recovery of the penalty or

> penalties incurred under this act to be the expense of making good the damage incurred or the removing to a proper place the thing deposited in violation of this act, such penalties to be recoverable by and in the name of the United States of America, with costs, in any circuit or district court of the United States, at the suit of any district attorney of the United States, *or at the suit of any person*, by information to any district attorney in any district where or near to where the offense shall have been committed or the offender shall be. [Emphasis added.]

On March 22, 1888, however, the Senate amended Section 5 by deleting the language extending from "such penalties to be recoverable" to the end of the Section and substituting in its place language that omitted the reference to enforcement "at the suit of any person." The clause then read: "such penalties to be recovered in the name of the United States in any district court within whose jurisdiction such offense shall be committed, said action to be instituted by the district attorney for such district at the instance of any person complaining." 19 Cong. Rec. 2338 (1888). Although S. 27 was not enacted, no attempt was made in subsequent sessions to restore language authorizing private suits; instead the only express enforcement provisions in the 1899 Act provided that the Act is to be enforced by the Department of Justice.

The court of appeals (Pet. App. 15 n.9) sought to explain this history as merely evidencing the rejection by Congress of a scheme for permitting private enforcement of the *penal* provisions of the legislation, and asserted that it shed no light on congressional intent respecting private *civil* actions. But contemporary practice shows that when congressional draftsmen wished to provide for private enforcement of some kind, they did so by express provisions. Thus Section 2 of the Rivers and Harbors Act of 1888, ch. 860, 25 Stat. 423 (now codified at 33 U.S.C. 500), provided that those who owned or

operated bridges with piers or abutments that, according to the finding of the Secretary of the Army, deflected the current in a manner that produced "caving of banks or otherwise serious damage or danger to property" would be required to repair the damage or prevent the danger to property according to the Secretary's directions, and it further provided that if they did not do so, "the owners or persons operating such bridge shall be liable in any court of competent jurisdiction to the persons injured in a sum double the amount of said injury." [12]

As both the rejected provision in S. 27, 50th Cong., 1st Sess. (1888), and the enacted provision now codified at 33 U.S.C. 500 reveal, when Congress wished to create rights of action in private parties, it knew how to do so. Its failure to provide expressly for a private action such as the suit brought by plaintiffs here is thus strong evidence that it had no intent to create such a cause of action. See *Touche Ross & Co.* v. *Redington, supra,* 442 U.S. at 572; *Blue Chip Stamps* v. *Manor Drug Stores,* 421 U.S. 723, 734 (1975).

C. The Statute was Designed to Benefit the Public at Large, Not Members of Any Special Class

Another telling point concerning the language of the 1899 Act, and Section 10 in particular, is the absence of any language "describing [a] special class to be benefited." *Cannon* v. *University of Chicago, supra,* 441 U.S. at 690. The absence of such language distinguishes this

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[12] This section also provides that "nothing herein contained shall be construed so as to affect any rights of action which may have existed prior to August 11, 1888," thereby expressly preserving any private civil remedies not dependent on a federal statute.

This section was one of "the general laws relating to mainteance, preservation and protection of navigable waters of the United States" that was included in a compilation forwarded to Congress in a letter from the Secretary of War in 1397. H.R. Doc. No. 293, 54th Cong., 2d Sess. 1, 2-3 (1897). See *United States* v. *Republic Steel Corp., supra,* 362 U.S. at 486, describing the close relation of this document to the 1899 Act.

case from cases such as *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969), in which, as the Court noted in *Cannon* (441 U.S. at 690), the "dispositive language" in the statute at issue stated that "no person" should be denied the right to vote for failure to comply with certain types of unapproved state enactments. *Cannon* itself is also distinguishable in that the statute involved there similarly focused upon individuals whom Congress sought to protect from discrimination on the basis of sex. By contrast, as this Court noted in *Cannon* (441 U.S. at 691 n.13), the 1899 Act is a statute that "creates a duty in favor of the public at large." See also *Wyandotte Transportation Co.* v. *United States*, 389 U.S. 191, 201 (1967) (government is "a principal beneficiary of the Act, if not the principal beneficiary").

Not only does the 1899 Act contain no language singling out a special class of intended beneficiaries, it expressly creates a scheme under which the interests of private individuals may be sacrificed in favor of the common good. Thus, in the second and third clauses, of Section 10, Congress conferred authority on the Secretary of ~~Army~~ War to permit certain structures and activities which, in his view, did not constitute "unreasonable obstructions" to navigable capacity, *Wisconsin* v. *Illinois*, 278 U.S. 367, 413 (1929). There is no indication in either the legislative history of the 1899 Act or in cases construing it that the Secretary is bound to consider the interests of particular individuals in determining whether an obstruction is "unreasonable," so long as the interest of the general public warrants the grant of a permit. Given the language and structure of the Act, the court of appeals thus erred in concluding (Pet. App. 12-14) that private parties are intended beneficiaries of the Act.

To be sure, as the court of appeals noted (Pet. App. 12-13), Section 10 of the 1899 Act, and its immediate predecessor, Section 10 of the Rivers and Harbors Act of

1890, ch. 907, 26 Stat. 454,[13] were enacted, at least in part, in response to the decision in *Willamette Iron Bridge Co.* v. *Hatch*, 125 U.S. 1 (1888),[14] an action between private parties in which this Court held that, in the absence of relevant statutes, there was no federal remedy which would allow a private party to compel removal of obstacles to navigation. It does not, however, follow that because *Williamette* was a private action, Congress intended that the 1899 Act should be directly enforceable in the courts by private parties.

Rather, the most disturbing aspect of *Willamette* was the clear implication that the federal government itself had no basis in existing law by which it could prevent or compel the removal of obstacles to navigation. As Senator Edmunds remarked in discussing the Judiciary Committee's response to *Willamette* (21 Cong. Rec. 8607 (1890) (emphasis added)) "the [C]ourt has said if [a bridge] is not affirmatively authorized or condemned by law there is *nobody* who can punish that company for obstructing the river." And as Senator Spooner thereafter recounted (*ibid.*), an attempt he had made "to apply to the War Department for some relief against obstructions at the head of Lake Superior which were to the great disadvantage of the Government," came to naught because he was "advised that there was no power under the law in the Government to prevent them." Thus, although the debate on the 1890 Act indicates that Con-

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[13] Because of the close relationship between the 1890 and 1899 Acts, this Court has frequently relied on the 1890 Act and its legislative history as an aid in interpreting the 1899 Act. *United States* v. *Pennsylvania Chem. Corp.*, 411 U.S. 655, 663-664 (1973); *United States* v. *Standard Oil Co.*, 384 U.S. 224, 227-228 (1966); *United States* v. *Republic Steel Corp.*, *supra*, 362 U.S. at 486-488.

[14] In fact, legislative proposals embodying provisions similar to those adopted in the 1890 Act were under active consideration by Congress for several years prior to the date of the *Willamette* decision. See *United States* v. *Republic Steel Corp.*, *supra*, 362 U.S. at 499-500 (Harlan, J., dissenting).

gress was aware that individual groups of citizens had on rare occasions attempted, usually without success to enjoin obstructions, and were unable to obtain the aid of federal authorities because those authorities had no law under which to proceed (21 Cong. Rec. 8603 (1890) (remarks of Sen. Vest)), there is no suggestion that the enforcement of the 1890 Act, and by extension the 1899 Act, was conceived as being entrusted to private parties as well as to the federal government.

D. The Court of Appeals Erroneously Relied on Its Own View of How the Statutory Scheme Might Best Be Enforced

We submit, therefore, that the intent of Congress as expressed in the language and the legislative history of the 1899 Act is inconsistent with an implied private right of action, and that none of the grounds relied on by the court of appeals justifies its contrary holding. The court in fact acknowledged that it found "no hard and precise indication of a congressional intent to create or deny a private remedy under Section 10" (Pet. App. 12) and that "[n]ormally * * * express statutory enforcement provisions [like Section 12 and 17, 33 U.S.C. 406 and 413] would imply that no other means of enforcement are intended, with only clear contrary evidence of a legislative intent to rebut this presumption" (Pet. App. 16). The court of appeals sought to evade the logical result of this principle by invoking this Court's consistent construction of "the Act's language in a manner apparently aimed toward effectuating the underlying statutory policies," that a private right of action would be consistent with the purposes of the 1899 Act "and complementary to its enforcement" (*id.* at 16-17, 18-20). But the two principal cases cited in support of these arguments (*Wyandotte Transportation Co.* v. *United States*, *supra*, 389 U.S. at 201; *United States* v. *Republic Steel Corp.*, *supra*), were cases in which remedies in suits brought by the government were found in the 1899 Act by implication. Moreover, the court of appeals' reasoning does not

reflect recent decisions of this Court which suggest that specific indications in a statutes's language and legislative history of a congressional intent to preclude a particular remedy cannot be overcome by finding that such a remedy might serve the general purposes of the statute.[15]

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[15] In any event, we do not concede that permitting private enforcement of the 1899 Act necessarily effectuates the legislative scheme. By resorting to litigation without even having asked the Corps to investigate the effect of the pumping at issue on the navigable capacity of Delta waters, plaintiffs induced the district court to decide, *in the first instance*, whether the pumping activities had such an effect on navigable waters as to require permits. When, in cases unlike this suit, the Corps is effectively required by district court orders to process permit applications relating to activities that, in the view of the Corps, have an insignificant effect on navigable waters, the Corps' resources may well be diverted from processing and monitoring permits for activities with more severe effects on navigation and navigable capacity. It is doubtful whether Congress intended for the courts to dictate the government's administrative and enforcement priorities in this manner.

Moreover, although the district court did not finally enjoin the operation of the pumping plants pending the issuance of a Section 10 permit, nothing in its reasoning (Pet. App. 72-80) or in that of the court of appeals (*id.* at 11-22) would preclude courts from granting such relief to private parties. And the availability of such relief at the behest of private parties could have the same ill effects on the administration of Section 10 of the 1899 Act as the Second Circuit, in *Connecticut Action Now, Inc.* v. *Roberts Plating Co.*, 457 F.2d 81 (1972), perceived with respect to Section 13 of the Act. In ordering dismissal of that suit brought to enforce Section 13, the court observed (457 F.2d at 89):

> The clear congressional purpose, it seems to us, was to concentrate at least this type of public and general enforcement in the Department. If both the Attorney General and private individuals could institute enforcement proceedings, there would only be a difference of degree, between criminal prosecutions and civil injunction suits in the possibilities of conflict and disruption. A careful federal decision not to seek an injunction because of some general policy, or in view of other means of ending or alleviating the discharge, could be upset by any individual who thought he understood better the needs of the public. We doubt that the 1899 Congress, when it enacted § 413, envisaged that the theory of participatory democracy would be carried so far.

Similarly, regardless whether the court of appeals was correct in concluding (Pet. App. 20-21) that the fourth *Cort* v. *Ash* factor favors the implication of a private cause of action, *i.e.*, "that this case is not the type of action traditionally relegated to state law," the evidence of congressional intent that we have outlined above precludes consideration of the matter.

E. The Lower Courts Generally Agree that Section 13 of the 1899 Act Is Not Enforceable by Private Parties, and Section 10 Should Be Treated No Differently

Nearly all of the courts to have considered the question agree that no private cause of action exists to enforce Section 13 of the Rivers and Harbors Act of 1899, 33 U.S.C. 407, which generally prohibits the deposit of refuse in navigable waters. See, *e.g.*, *National Sea Clammers Ass'n* v. *City of New York*, 616 F.2d 1222, 1232 (3d Cir.), cert. granted, No. 79-1760 (Oct. 20, 1980); *City of Evansville, Ind.* v. *Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008, 1011-1012 (7th Cir. 1979); *Connecticut Action Now, Inc.* v. *Roberts Plating Co.*, 457 F.2d 81, 89 (2d Cir. 1972); *Barcelo* v. *Brown*, 478 F. Supp. 646, 671 (D.P.R. 1979).[16] The courts are in conflict with regard to Section 10 of the 1899 Act (compare, *e.g.*, the decision below; *Norfolk & Western Co.* v. *United States*, No. 78-3271 (6th Cir. Oct. 21, 1980), slip op. 19-21; *Tatum* v. *Blackstock*, 319 F.2d 397 (5th Cir. 1963); *River* v. *Richmond Metropolitan Authority*, 359 F. Supp. 611, 639 (E.D. Va.), aff'd per curiam, 481 F.2d 1280 (4th Cir. 1973); *Citizens Committee for the Hudson Valley* v. *Volpe*, 302 F. Supp. 1083, 1087-1090 (S.D.N.Y. 1969), aff'd, 425 F.2d 97 (2d Cir.), cert.

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[16] The Fifth Circuit would permit civil enforcement of Section 13 of the 1899 Act in cases in which "defendants' conduct constituted an interference with navigation by which plaintiffs were injured." *Guthrie* v. *Alabama By-Products Co.*, 456 F.2d 1294, 1295 (5th Cir. 1972). As the court in *Barcelo* v. *Brown*, *supra*, notes (478 F. Supp. at 671 & n.52), the position of the Fourth Circuit is unclear.

denied, 400 U.S. 949 (1970). *Red Star Towing and Transportation Co.* v. *Dep't of Transportation of New Jersey*, 423 F.2d 104, 105 (3d Cir. 1970); *Loveladies Property Owners Ass'n Inc.* v. *Raab*, 430 F. Supp. 276, 281 (D.N.J. 1975), aff'd, 547 F.2d 1162 (3d Cir. 1976); *Hooper* v. *United States*, 331 F. Supp. 1056, 1058 (D. Conn. 1971); *Cross* v. *Pace*, 106 F. Supp. 484, 488 (D.D.C. 1952).[17] For the reasons we have set out above

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[17] We do not agree with the court of appeals (Pet. App. 14 n.8) that *Wisconsin* v. *Illinois*, 278 U.S. 367 (1929), "standing alone, might constitute adequate authority for allowing others beside the federal government to enforce the requirements of the Rivers and Harbors Act." That suit by Wisconsin and other states to enjoin excessive diversions of water from Lake Michigan and the dumping of sewage into certain waterways was not dependent on the 1899 Act for a cause of action. The Court was required to construe the 1899 Act in that case because defendants sought to raise certain permits issued to them under the Act as a defense to the bill of complaint.

In the line of cases exemplified by *Tatum* v. *Blackstock*, *supra*, the courts have held that a private party suffering special injury from obstructions in navigable waters may, where those obstructions violate Sections 9 or 10 of the 1899 Act, sue in federal court for equitable relief, the action being viewed as one invoking the court's federal question jurisdiction. See, *e.g.*, *Neches Canal Co.* v. *Miller & Vidor Lumber Co.*, 24 F.2d 763 (5th Cir. 1928); *River* v. *Richmond Metropolitan Authority*, 359 F. Supp. 611 (E.D. Va.), aff'd per curiam, 481 F.2d 1280 (4th Cir. 1973) (noting that questions of standing or jurisdiction were not raised by parties to the appeal); *Silvey* v. *Commissioners of Montgomery County, Ohio*, 273 F. 202 (S.D. Ohio 1921); *Carver* v. *San Pedro, L.A. & S.L.R. Co.*, 151 F. 334 (S.D. Cal. 1906); *E.A. Chatfield Co.* v. *City of New Haven*, 110 F. 788 (D. Conn. 1901). See also *Lownsdale* v. *Gray's Harbor Boom Co.*, 117 F. 983 (W.D. Wash. 1902) (finding subject matter of such a suit within the court's equitable jurisdiction if diversity were shown, but doubtful whether it would find federal question jurisdiction). We disagree with those cases because we believe they misread the intent of Congress in the 1899 Act; but in any event plaintiffs have not alleged the type of special damage required to make out a cause of action under those cases nor, even assuming the allegations were adequate, have they established proof of special damage sufficient to entitle them to equitable relief.

(pages 15-24, *supra*), we submit that congressional intent concerning the proper party to enforce the 1899 Act is the same with respect to Section 10 as it is with respect to Section 13. Judicial enforcement of the Act was confided to the United States acting through the Attorney General, and not to private parties. Accordingly, plaintiffs had no basis for bringing this action, and it should be remanded to the district court with directions to dismiss the complaint.[18]

II. SECTION 10 OF THE RIVERS AND HARBORS ACT OF 1899 APPLIES TO A STATE WATER ALLOCATION PROJECT THAT DIVERTS WATER FROM A NAVIGABLE CHANNEL WHERE THE DIVERSION ALTERS OR MODIFIES THE COURSE, LOCATION, CONDITION, OR CAPACITY OF THE CHANNEL

It is common ground in this case (see State Br. 24-25; Kern Br. 30) that the prerogative of the states to determine water rights and uses within their borders is limited by the "superior power of the General Government to secure the uninterrupted navigability of all navigable streams within the United States." *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U.S. 690, 703 (1899). Accord, *California* v. *United States*, 438 U.S. 645, 662 (1978); *Kansas* v. *Colorado*, 206 U.S. 46, 86, 117-118 (1907). Section 10 of the Rivers and Harbors Act of 1899 was enacted pursuant to that power, and as the State concedes (State Br. 15), it has "a very broad reach."

Nevertheless, it is argued that Section 10 does not reach the State project at issue. In answering that contention, we first examine the scope of the provision as it

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[18] Because the Secretary of the Army has not yet acted upon the State's permit application, there is at present no final administrative action which could be subject to judicial review under the Administrative Procedure Act, 5 U.S.C. 706. See *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 317-319 (1979).

controls non-governmental activity and then address the suggestion that Section 10 exempts State projects or regulates them in a lesser way.

A. The Operation of the Pumping Station Comes Within Clause 3 of Section 10

1. The first clause of Section 10 of the 1899 Act is a general prohibition against "[t]he creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States"; the second clause makes it unlawful to build certain types of structures in waters of the United States outside established harbor lines "except on plans recommended by the Chief of Engineers and authorized by the Secretary of the Army"; and the third clause, in pertinent part makes it "unlawful to excavate or fill, or in any manner to alter or modify the course, location, condition, or capacity of * * * the channel of any navigable water of the United States unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to the beginning of same." This Court has construed this section as prohibiting, in its first clause, any "unreasonable obstructions" to navigable capacity and as specifying in the second and third clauses certain types of works which may not be undertaken until the Secretary of the Army (originally the Secretary of War) acting through the Corps of Engineers has considered them and determined whether they fall outside the class of unreasonable obstructions generally prohibited by the first clause. *Wisconsin* v. *Illinois*, 278 U.S. 367, 412-413 (1929). See also *United States* v. *Republic Steel Corp.*, 362 U.S. 482, 486-487 (1960). If they do not constitute unreasonable obstructions, then the Secretary of the Army may permit them.[19]

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[19] The Secretary of the Army may deny a permit on grounds other than the effect of a Clause 2 structure or a Clause 3 activity on navigable capacity (*United States ex rel. Greathouse* v. *Dern*, 289 U.S. 352 (1933); *Zabel* v. *Tabb*, 430 F.2d 199 (5th Cir. 1970), cert. denied, 401 U.S. 910 (1971); but the existence of such other

Thus, in a lecture delivered to the Company Officers Class of the Engineer School at Fort Humphreys, Va., in 1926, Judge G. W. Koonce of the Corps, who had been instrumental in drafting the 1899 Act explained its provisions in the following terms:

> [The first clause] can * * * be invoked to prevent the doing of things on unnavigable streams, the effect of which would impair the navigable capacity of a navigable stream. * * * [And early in the administration of the 1899 Act], the Chief of Engineers maintained: That the essence of the whole section is contained in the first clause, the obvious purpose of which is to prevent the execution of any work or the doing of any act that will obstruct, injure or destroy the navigable capacity of any navigable water unless expressly authorized by Congress—
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> That the succeeding clause[s] making it unlawful to build any structure, or to modify the condition or capacity of a navigable water, without the prior recommendation of the Chief of Engineers and authorization of the Secretary of War, was intended to insure the accomplishment of the aforesaid purpose, and not to empower them to authorize obstructive works: —that the effect of this latter clause is to necessitate the submission of every project of the kind to the Chief of Engineers and the Secretary of War, and to commit to them the duty of investigat-

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grounds (e.g. adverse effects on the environment apart from navigable waters) does not control the threshhold determination whether a particular structure or activity comes within the terms of the second or third clause of Section 10 and thus requires the Secretary's approval before it may be undertaken.

Under current law, before granting a Section 10 permit, the Corps must consult with the Department of the Interior's Fish and Wildlife Service to determine the effect on fish and wildlife of a project for which a permit is sought (Fish and Wildlife Coordination Act, 16 U.S.C. 661 *et seq.*), and must formally assess the environmental effects of the project through the preparation of an Environmental Impact Statement, pursuant to the National Environmental Policy Act of 1969, 42 U.S.C. 4321 *et seq.*

> ing and determining whether or not the project will obstruct or injure navigability * * *.

G. Koonce, *Federal Laws Affecting River Harbor Works* (1926), *reprinted in Water Pollution Control Legislation —1971 (Oversight of Existing Programs): Hearings Before the House Comm. on Public Works*, 92d Cong., 1st Sess. 289 (1971). See also *United States* v. *Joseph G. Moretti, Inc. ("Moretti II")*, 526 F.2d 1306, 1309 (5th Cir. 1976); *Hubbard* v. *Fort*, 188 F. 987 (D.N.J. 1911).

2. The Water Agency petitioners contend (Kern Br. 40-46) that changes in the level and flow characteristics of navigable waters, which they distinguish (*id.* at 41) from changes "in a physical structure enclosing the water" do not trigger the permit requirements imposed by Clause 3 unless there is a showing that those changes unreasonably and substantially impair navigation. Although they link this contention to their arguments concerning the special character of state water allocation systems, it is logically separate, because their construction of the language would necessarily affect the coverage of that clause regardless of the character of the project producing the effects in question and regardless of the identity of the project's sponsor. In our view, the contention is erroneous because it rests on an unnecessarily limited construction of the term "channel" and on a mistaken understanding of the relationship of Clause 3 to Clause 1 of Section 10.

Clause 3 refers in pertinent part to alterations and modifications of "the course, location, condition, or capacity" of certain enumerated bodies of water, including lakes and canals, and of "the channel of any navigable water." If the term "channel" means, as the Water Agency petitioners urge (Kern Br. 41), only the bed of a navigable water, *i.e.*, "the physical structure carrying the water," then the reference to "course" would make little sense. Waters, not streambeds, are properly described as having a course. In any event, in *Oklahoma*

v. *Texas*, 258 U.S. 574, 592-593 (1922), this Court identified the "middle of the main channel" of a navigable stream with "the thread of the navigable current." More importantly, it would be anomalous for Clause 3 to cover alterations in the condition of lakes and canals, without limitation to the "physical structures" enclosing the waters, while imposing that limitation on rivers and streams, and to cover reductions in the capacity of a stream to carry boats caused by, *e.g.*, silting of the streambed, but not equivalent reductions caused by a diversion of the water that actually supports the boats.

A more fundamental flaw in the Water Agency petitioners' construction of Clause 3 is that they confuse the criteria for justifying the denial of a permit with the criteria for triggering an inquiry by the Corps into whether the activity in question should be permitted. As noted above (page 27), Clause 1 prohibits unreasonable obstructions of navigable capacity without the consent of Congress. Clauses 2 and 3 define certain structures and activities that have an impact on navigable capacity and thus call for consideration by the Secretary of the Army, acting through the Corps, to determine whether they threaten an unreasonable obstruction. By arguing (Kern Br. 46) that the Section 10 permit requirements are not triggered by evidence of water diversions unless "those diversions alter flows in a manner that unreasonably and substantially impairs the stream's capacity to support established navigation," the Water Agency petitioners have confused conditions that would justify the denial of a permit with conditions that merely trigger an inquiry into whether a permit should be granted.

United States v. *Rio Grande Dam & Irrigation Co.*, *supra*, is not to the contrary. In that case this Court was applying Section 10 of the 1890 Rivers and Harbors Act, ch. 907, 26 Stat. 454-455, which prohibited "the creation of any obstruction, not affirmatively authorized by law, to the navigable capacity of any waters, in respect of

which the United States has jurisdiction," and which authorized the Attorney General to bring an injunctive action against the creation or continuance of such an obstruction. No mention is made of Section 7 of the 1890 Act, ch. 907, 26 Stat. 454, which contained the provision on which Clause 3 of Section 10 of the 1899 Act is based. Since the Attorney General was seeking in *Rio Grande* to enjoin construction of a dam that he asserted was, in effect, an unreasonable obstruction to navigable capacity, the Court properly stated the test for restraining the dam's construction as whether the resulting appropriation of water "substantially interferes with the navigable capacity within the limits where navigation is a recognized fact." *United States* v. *Rio Grande Dam & Irrigation Co.*, *supra*, 174 U.S. at 709.

We do not suggest, however, that literally any alteration of the condition or capacity of a navigable water triggers review by the Corps of Engineers. Congress must have contemplated the application of a de minimis standard lest such insubstantial matters as slight increases in surface water runoff produced by the clearing of small plots of land make Corps permission necessary for such minor shore-based activities. We assume, moreover, that an alteration or modification must be of a type with the potential for affecting navigation, *i.e.*, that water quality alterations would not be covered unless they are of a type with the potential for reducing stream capacity, for example, by increasing siltation.[20] The court of ap-

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[20] Current Corps of Engineers regulations generally require a Section 10 permit for structures or work located outside of navigable waters "if these structures or work affect the course, location, or condition of the waterbody in such a manner as to impact on the navigable capacity of the waterbody." 33 C.F.R. 322.3(a)(1). However, the Corps has recently published a notice of proposed rulemaking which, if adopted, would revise the above provision so as to require a Section 10 permit "if these structures or work affect the course, location, or condition of the waterbody in such a manner as to impact on the physical capacity of the waterbody." 45 Fed. Reg. 62732, 62744 (1980).

peals gave Clause 3 a broad reading (Pet. App. 27-28), but it did not clearly reject these limiting principles. In any event, this record does not present the question of broader coverage because the district court found an actual obstruction of navigable capacity; the factual finding was not directly challenged in the court of appeals as "clearly erroneous"; and the State here concedes (State Br. 9, 53) that the finding was correct.

B. Section 10 of the 1899 Act Applies to States As Well As to Individuals and Corporations

The State makes two separate arguments to the effect that, whatever may be the application of Section 10 to private parties, it does not apply at all to a state (State Br. 48-50) or at least not to any state project that is part of a state water allocation system (State Br. 37-39). The latter argument is answered, a fortiori, by our response below to the narrower argument, made by both sets of petitioners, that Section 10 of the Act applies to such projects, but only when they result in substantial impairments to actual navigation.

Because it rests on different reasoning, we briefly address here the State's argument (State Br. 48-50) that regardless of the character of the project concerned, states are not covered by the 1899 Act or at least have a status different from individuals and corporations.

A similar argument was squarely rejected by this Court in *United States* v. *Arizona*, 295 U.S. 174 (1935). There the United States had argued that Section 9 of the Act, 33 U.S.C. 401, and Section 12 of the Act, 33 U.S.C. 406—which is an enforcement provision for Section 9 as well as for Section 10—applied only to private parties, and that a dam to be built by the federal government in a navigable interstate stream as part of a reclamation project therefore did not require proof of congressional approval. This Court gave the argument short shrift, stating (295 U.S. at 184):

> These provisions [Sections 9 and 12 of the 1899 Act] unmistakably disclose definite intention on the part

> of Congress effectively to safeguard rivers and other navigable waters against the unauthorized erection therein of dams or other structures for any purpose whatsoever. The plaintiff maintains that the restrictions so imposed apply only to work undertaken by private parties. But no such intention is expressed, and we are of opinion that none is implied. The measures adopted for the enforcement of the prescribed rule are in general terms and purport to be applicable to all. No valid reason has been or can be suggested why they should apply to private persons and not to federal and state officers. There is no presumption that regulatory and disciplinary measures do not extend to such officers. Taken at face value the language indicates the purpose of Congress to govern conduct of its own officers and employees as well as that of others. *Donnelley* v. *United States*, 276 U.S. 505, 516.

Other decisions of this Court also make it clear that Section 10 is not limited to private parties. See *e.g.*, *New Jersey* v. *New York*, 283 U.S. 336, 344-345, 348 (1931); *United States* v. *Rio Grande Dam & Irrigation Co.*, *supra*, 174 U.S. at 709 (regarding the predecessor 1890 Act).

Parker v. *Brown*, 317 U.S. 341 (1943), a case construing the Sherman Act, 15 U.S.C. 1 *et seq.*, is hardly authority for the startling proposition that in its attempt to safeguard rivers, Congress did not see fit to make the measures applicable to states. We note moreover, that the State itself apparently assumed that the 1899 Act applied to its activities when it applied in 1967 for a Section 10 permit to cut a levee for Clifton Court Forebay (J.A. 115a-119a).

C. Alterations in the Condition and Capacity of the Delta Waters Produced by the Delta Pumping Station Were Sufficient To Trigger the Permit Requirements of Section 10 of the 1899 Act, Notwithstanding the Station's Function As a Component of a State Water Allocation System

Petitioners lack any basis in the statutory language for their principal argument that Section 10 either does not

apply to state projects for allocating water for reclamation purposes and other uses, or that it applies in an attenuated way that exempts such state projects from permit requirements that would apply to any other type of project. The effect of the Delta Pumping Station on navigable waters (net flow reversals and reductions in water levels) brings it within the terms of Clause 3, as we have shown, and there is no express language limiting the application of Section 10 where state water allocation systems are concerned.

Petitioners rely almost entirely on provisions in other statutes, which, they contend (State Br. 19-36; Kern Br. 27-36), embody a congressional policy of deference to state water rights laws that can be accommodated only by permitting a state to do what is plainly forbidden by the second and third clauses of Section 10 of the 1899 Act, so long as the state's actions can be characterized as part of a state water rights allocation scheme. The cited statutes bear no such construction. Those enacted before passage of the 1890 Act indicate no intent on the part of Congress to forego enacting measures designed to protect the navigability of navigable waters, and those enacted after passage of that Act and of the 1899 Act reveal no intent to make it inapplicable to those structures and activities to which statutory terms clearly apply.

The Mining Act of 1866, ch. 262, 14 Stat. 251, and the Desert Land Act of 1877, ch. 107, 19 Stat. 377, recognized the rights of the states to determine water rights according to the riparian doctrine or the prior-appropriation doctrine or any modification of either or combination of the two. See *California* v. *United States*, 438 U.S. 645 (1978); *California Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142 (1935). But this Court made it clear in *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899), a case in which the defendant relied on those same 1866 and 1877 statutes, that a state's undoubted power to "change [the] common law [riparian rights] rule and permit the

appropriation of the flowing waters for such purposes as it deems wise" (*id.* at 703),[21] was "limited by the superior power of the General Government to secure the uninterrupted navigability of all navigable streams within the limits of the United States" (*ibid.*). As the Court explained (*ibid.*): "[T]he jurisdiction of the General Government over interstate commerce and its natural highways vests in that Government the right to take *all needed measures to preserve* the navigability of the navigable water courses of the country even against state action" (emphases added). As explained above (pages 27-29, *supra*), the measures taken by Congress in the 1899 Act to preserve navigability include a system (based on Section 7 of the 1890 Act, ch. 907, 26 Stat. 454) for monitoring appreciable alterations of the condition or capacity of navigable streams to ensure that they will not operate as unreasonable obstructions to navigability.

Even assuming—contrary to the understanding of this Court (*United States* v. *Republic Steel Corp.*, *supra*, 362 U.S. at 486; *Wisconsin* v. *Illinois*, *supra*, 278 U.S. at 412)—that the 1899 Act included substantive changes and was not just a recompilation of the 1890 Act, the laws passed in 1891 and 1897 on which petitioners rely (State Br. 26-27; Kern Br. 30) do not reflect any relaxed policy against potential threats to navigability where state water diversion schemes were concerned. In the Act of Mar. 3, 1891, ch. 561, 26 Stat. 1101, amending existing laws so as "to reserve reservoir sites [on public lands] from settlement but to open them up for use in reclamation projects" (*California* v. *United States*, *supra*, 438 U.S. at 659), Congress provided that this privilege was not to interfere with existing state authority over "control of water for irrigation and other purposes." 26 Stat. 1102. Nothing in this language, how-

[21] The purposes to be served by the proposed dam in *Rio Grande*, through the diversions of the impounded waters were "irrigation and [the supply of] water for municipal and manufacturing uses * * *." 174 U.S. at 701.

ever, suggests that a state's control of water for such purposes included the right to alter navigable waters in ways that might reduce their navigability. Similarly, the amendment of the 1891 statute, the Act of Feb. 26, 1897, ch. 335, 29 Stat. 599 in 1897,—on which petitioners strongly rely (see State Br. 27-28)—provided that "the charges for water" from reservoir sites on public lands were to be "subject to the control and regulation of the respective States and Territories," but, again, there is no suggestion that this was intended to affect restrictions on state action under the 1890 Rivers and Harbors Act. Indeed, that same amendment provided that "any State is hereby authorized to improve and occupy reservoir sites *to the same extent as an individual or private corporation* * * *." Act of Feb. 26, 1897, ch. 335, 29 Stat. 599 (emphasis added).[22]

Were the statutes enacted after passage of the 1899 Act to be construed as petitioners urge, they would necessarily operate as implicit partial repeals of that statute. It is, however, a familiar rule of statutory construction that repeals by implication are not favored. *TVA* v. *Hill*, 437 U.S. 153, 189-190 (1978); *Morton* v. *Mancari*, 417 U.S. 535, 549-551 (1974). In any event, no such implication is discernable in them.

Petitioners principally rely on Section 8 of the Reclamation Act of 1902, 43 U.S.C. 383, in which, they contend (State Br. 29), "Congress continued and extended the

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[22] The remarks of Congressman Lacey in connection with the 1897 amendment, which are quoted by the State (State Br. 27-28) and by this Court in *California* v. *United States*, *supra*, 438 U.S. at 661-662, do not purport to reflect the government's exercise of power over matters touching on navigability. Congressman Lacey went out of his way to point out that the reservoir waters were "surface waters, the waters of small streams not navigable." 29 Cong. Rec. 1948 (1897). And as this Court has recently noted (*California* v. *United States*, *supra*, 438 U.S. at 662), Congressman Lacey's views concerning state control of interstate waterways were reflected in *United States* v. *Rio Grande Dam & Irrigation Co.*, *supra*, in its recognition that only two federal limitations on a state's control of its streams existed, one of them being "the navigation servitude."

principle of state control of water." [23] But again, nothing in the statutory language requires or implies that the section was to operate as a limitation on the construction of the 1899 Act.[24] Indeed, even though Section 8 provides that

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[23] Section 8 of the Reclamation Act of 1902 provides in pertinent part (43 U.S.C. 383) (emphasis added):

> Nothing *in this Act* shall be construed as affecting or intended to affect or to in any way interfere with the laws of any State or Territory relating to the control, appropriation, use, or distribution of water used in irrigation, or any vested right acquired thereunder, and the Secretary of the Interior, in carrying out the provisions of this Act, shall proceed in conformity with such laws, and nothing herein shall in any way affect any right of any State or of the Federal Government or of any landowner, appropriator, or user of water in, to, or from any interstate system or the waters thereof.

[24] The State is also incorrect in its contention (State Br. 51) that Sections 2 and 10 of the Reclamation Act of 1902, 43 U.S.C. 411, 373, which grant certain powers to the Secretary of the Interior, make the 1899 Act inapplicable "to water diversions from reclamation projects built and operated by the federal government." In making this argument the State is attacking the reasoning of the court of appeals, not its judgment; for the court of appeals, agreeing with the argument made below by the federal respondents, concluded (Pet. App. 40-49) that the federal government's Tracy Pumping Plant was authorized by Congress, pursuant to procedures established in subsequent federal reclamation legislation. The State thus errs in asserting (State Br. 51) that "the United States" made the argument below that the State now makes with respect to the Reclamation Act of 1902.

Our views on the basis for concluding that the Tracy Pumping Plant was authorized by Congress are set forth in the federal respondents' opposition to the petition for certiorari filed in No. 79-1625, *Sierra Club et al.* v. *Cecil D. Andrus, et al.*, still pending before the Court. We do not believe the question is properly presented in these consolidated cases, however. "This Court * * * reviews judgments, not statements in opinions." *Black* v. *Cutter Laboratories*, 351 U.S. 292, 297 (1956). Accord, *FCC* v. *Pacifica Foundation*, 438 U.S. 726, 734 (1978). Had the Court granted the petition in No. 79-1625, the State, of course, could have properly advanced its argument as an alternative ground for supporting the judgment of the court of appeals.

nothing "in this Act" is intended to interfere with state law "relating to the control, appropriation, use, or distribution of water used in irrigation," this Court has held that another provision of the same act (Section 5, 43 U.S.C. 431), which prohibits the sale of a water use right for lands exceeding 160 acres in single ownership, imposes a condition on distribution of water from projects established under the 1902 Act that supersedes any contrary state law. *Ivanhoe Irrigation District* v. *McCracken*, 357 U.S. 275 (1958). See also *City of Fresno* v. *California*, 372 U.S. 627 (1963) (Section 8 of the Reclamation Act of 1902 no barrier to federal government's exercise of eminent domain powers to acquire water rights in furtherance of Central Valley Project, notwithstanding any interference with priorities for water uses under state law). See generally *California* v. *United States*, *supra*, 438 U.S. at 670-673. If Section 8 did not sanction state laws respecting distribution of water where they conflicted with other provisions of the same act, it surely cannot be read as sanctioning such laws where they conflict with provisions of other statutes, enacted pursuant to different constitutional powers.[25]

It should be stressed that petitioners do not restrict their claim to state laws respecting *reclamation*. They argue that the Act cannot be applied to any water diversions made pursuant to *any* "water allocations" plan

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[25] The State misreads *Kansas* v. *Colorado*, 206 U.S. 46 (1906), when it suggests (State Br. 25 n.12, 13) that by observing that "legislation" of "the National Government" does not "override state laws in respect to the general subject of reclamation" (206 U.S. at 92), the Court held that laws enacted pursuant to the Commerce Clause, as distinguished from the navigation servitude, could never preempt conflicting state laws respecting reclamation. In context, the Court's observation suggests only that the federal government is not generally free to make reclamation laws for the states, *e.g.*, to "enter the territory of the States along the Atlantic and legislate in respect to improving by irrigation or otherwise the lands within their borders." *Ibid.* In the Rivers and Harbors Act of 1899, of course, the United States asserted its "sovereign power to regulate commerce and to control the navigable waters within its jurisdiction." *Sanitary District* v. *United States*, 266 U.S. 405, 425 (1925).

under state law without a showing that navigation will be substantially impaired. Otherwise, they contend, the congressional policy of deference to state water rights laws embodied in those statutes enacted between 1866 and 1902 would be contravened.

Justice Holmes' opinion for the Court in *Sanitary District* v. *United States*, 266 U.S. 405 (1925), squarely refutes this contention. That was a suit by the United States to enjoin water diversions from Lake Michigan by an agency of the State of Illinois which had allocated the diverted water for use in a channel "of size sufficient to take care of the sewage and drainage of Chicago as the increase of population might require." 266 U.S. at 424. The Secretary of the Army, pursuant to his authority under Clause 3 of Section 10 to permit certain work and structures affecting navigable waters but not amounting to unreasonable obstructions of navigable capacity, had approved construction of a channel and water diversions from Lake Michigan up to a certain volume per minute. 266 U.S. at 423-424. When the Sanitary District threatened to divert more, the proceeding for injunctive relief was brought. Contrary to petitioners' suggestions (State Br. 44 n.25; Kern Br. 43-44), the "overwhelming evidence that [the water withdrawals in excess of a prescribed maximum] would affect navigation" (266 U.S. at 39) served *not* as the basis for the Secretary of War's assumption of permit jurisdiction but rather as the basis for his seeking a court order to enjoin the diversions because they amounted to unreasonable obstructions to navigable capacity for which the consent of Congress had not been obtained. Although the defendant Sanitary District was "proceeding under a state act," the Court nowhere suggested that the Secretary had been exceeding his authority by undertaking to monitor the diversions effected under this state water allocation plan.[26]

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[26] Petitioners' position is also undermined by a treatise which the State cites (State Br. 19) for the proposition that Congress dele-

Later federal statutes on which petitioners rely (State Br. 33-36) add nothing of substance to their argument, since the provisions cited merely recognize the interests and responsibilities of the states in developing and using their water supplies; they do not suggest that the states are thereby free to impair the navigable capacity of navigable waters or that the system prescribed by the 1899 Act for ensuring that serious impairments do not occur is inoperable where the states are concerned.

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gated "broad authority to the states" in the area of "water allocations under their water rights laws." In that treatise, 1 C. Kinney, *A Treatise on the Law of Irrigation and Water Rights* (2d ed. 1912) (hereinafter "Kinney, *Irrigation*"), published when the enactments of the Rivers and Harbors Act of 1899 and the Reclamation Act of 1902 were still of fairly recent memory, the author, a vigorous advocate of irrigation, comments on federal control of "methods of destroying the navigable capacity of a body of water [other] than by the construction of bridges or dams at navigable points." Kinney, *Irrigation* 590. He explains (*id.* at 590-591) that diversions from nonnavigable portions of streams for irrigation purposes may lessen "the flow of the navigable portion of the stream [and that the] waters from the tributaries of the stream may be diverted from their natural course to such an extent that the capacity for the navigation of the main river may be partially or wholly destroyed." He warns (*ibid.*) that "[a]ll of these must in time give way to the paramount right of navigation, unless Congress makes some radical changes in the law as it now stands, based upon the theory of the relative importance of [navigation and reclamation] interests." Commenting on the Reclamation Act of 1902 and certain other earlier statutes, he observes (*id.* at 594): "In none of these Acts is there any express right given to appropriate the waters of any navigable body of water in the United States, or in any way interfere with the navigable capacity of any of these waters."

Although this commentator was concerned primarily with the power of the federal government to *enjoin* irrigation-related diversions, he said nothing inconsistent with an understanding that structures and activities that come within the terms of the second and third clauses of Section 10 require Corps permits; and he acknowledged (Kinney, *Irrigation* 594 n.8) that the "control or supervision of the navigable waters of the United States" are "vested in the Secretary of War."

When Congress wishes to remove Corps of Engineers jurisdiction over matters that come within the term of the second or third clauses of Section 10, it does so directly. Thus, in Section 154 of the Water Resources Development Act of 1976, 33 U.S.C. 59*l*, Congress declared:

> The prohibitions and provisions for review and approval concerning wharves and piers in waters of the United States as set forth in sections 403 and 565 of this title shall not apply to any body of water located entirely within one State which is, or could be, considered to be a navigable body of water of the United States solely on the basis of historical use in interstate commerce.

Similarly, in Section 162 of the same statute, 33 U.S.C. 59*m*, Congress has declared three specific lakes "non-navigable" for "the purposes of [33 U.S.C.] 403." If Congress wishes to remove state water allocation systems from the coverage of Section 10, it may do so expressly. In urging their reading of Section 10 of the 1899 Act, petitioners are asking this Court to do the work of Congress.

Petitioners are not aided in their proposed construction of Section 10 by the federal preemption cases involving other areas of law on which they rely (State Br. 40-43; Kern Br. 35-36). This is not a case in which it is urged that comprehensive federal regulation of a field excludes state regulation. See *e.g.*, *Florida Lime & Avacado Growers, Inc.* v. *Paul*, 373 U.S. 132 (1963); *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). The court of appeals did not hold that all state water allocations are preempted by federal regulation of navigable waters. It held only that in effectuating allocation plans, states may not violate express provisions of Section 10 of the 1899 Act: they may not create unreasonable obstructions to the navigable capacity of any water of the United States without the consent of Congress and they may not build the structures or engage in the activities described in the second and third clauses of Section 10—without proper

approvals from the Secretary of the Army and the Corps of Engineers. None of the preemption cases cited by petitioners holds that states may do what a federal statute expressly forbids or that provisions of state law in direct conflict with federal law are valid.[27]

Finally, we note that there is no reason to assume that, in exercising its jurisdiction under Section 10 of the 1899 Act, the Corps of Engineers will disrupt state allocations of water without substantial reasons for doing so. The policy of deferring to state law respecting water rights where consistent with federal law can be accommodated in the permitting process. The Corps can, for example, issue a "general permit" for "a category or categories of structures or work in a specified region of the country, when those structures or work are substantially similar in nature and cause only minimal individual and cumulative adverse environmental impact." 33 C.F.R. 322.2(f). The issuance of such permits relieves those who build structures or engage in work within the permitted categories of the necessity of applying for individual permits. The Corps can also suggest ways in which water

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[27] Thus, in *New York Dep't of Social Services* v. *Dublino*, 413 U.S. 405 (1973), the Court found no evidence that Congress intended a federal work incentive program for public assistance recipients to preempt state work programs for such persons; but it remanded for a determination whether particular provisions of the two laws were in conflict. 413 U.S. at 422-423.

Parker v. *Brown*, 317 U.S. 341 (1943), on which the State relies heavily (State Br. 40 n.21, 48-49), is not to the contrary. There the Court held that the Sherman Act was not intended to apply to state marketing programs because the evils which the Act was designed to eliminate were restraints of trade operating by individual agreement, not "act[s] of government." 317 U.S. at 351-352. The evils the 1899 Act is aimed at eliminating are obstructions to navigable capacity—clearly not "acts of government," although they may be by-products of state governmental operations. Since, as we have demonstrated above (pages 32-33, *supra*), activities by states are covered by the 1899 Act, the general rule that state action is preempted when it conflicts with express provisions of federal law is fully applicable.

diversions can be made—for example, timing releases in relation to tidal cycles—so as to minimize the likelihood of serious impairments of navigable capacity. In sum, only where protection of federal interests demands will the Corps have any reason to call for modifications of water diversions planned by the state; and, of course any such permit conditions are fully reviewable under the Administrative Procedure Act. See 5 U.S.C. 702, 704.[28]

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[28] On June 15, 1967, the District Engineer for the Sacramento District Corps of Engineers granted a permit to the State under Section 10 of the 1899 Act, permitting it to "cut the westerly levee of West Canal, at Clifton Court Tract for Clifton Court Forebay in Contra Costa County, California" in accordance with plans shown on an attached drawing (J.A. 115a-116a). Both courts below concluded (Pet. App. 50-51, 96-99) that the permit could not constitute authorization for the Delta Pumping Plant because the State's application for the permit had not described the pumping plant or the scope of its present or future operations.

We believe that, for the reasons set forth in the opinion of the court of appeals (Pet. App. 50-51), the courts are correct in that conclusion. It is nevertheless, possible that the pumping plant's present operations are considered to have been permitted under the grandfather clause in Corps regulations, 33 C.F.R. 322.4(g). Pursuant to that regulation, the Corps permits all "[s]tructures or work completed before 18 December 1968 * * * provided there is no interference with navigation." It is a question of fact not yet resolved in this case whether the Delta pumping plant was completed before the critical date in 1968 (see page 11, *supra*). Of course the State will need a permit for the proposed enlargement of the plant's pumping capacity by 60% (see State Br. 10 n.6) and for the construction of the Peripheral Canal.

CONCLUSION

The judgment of the court of appeals should be reversed with directions that the complaint be dismissed for failure to state a claim. Should the Court, however, hold that plaintiffs were entitled to bring this action to enforce Section 10 of the Rivers and Harbors Act of 1899, then the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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DECEMBER 1980

☆ U. S. GOVERNMENT PRINTING OFFICE: 1980 334752 207

Nos. 79-1252 and 79-1502

SUPREME COURT OF THE UNITED STATES

October Term, 1980

STATE OF CALIFORNIA, et al.,
Petitioners,

v.

SIERRA CLUB, et al.,
Respondents.

KERN COUNTY WATER AGENCY, et al.,
Petitioners,

v.

SIERRA CLUB, et al.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

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STATEMENT OF THE CASE

In order to avoid unnecessary repetition, plaintiffs and respondents Sierra Club, Hank Schramm and William Dixon will adopt, with two discrete reservations, the Statement of the Case set forth at pages 3-11 of the Brief for the Federal Respondents previously filed in these cases by the Solicitor General on December 19, 1980. The two exceptions relate to (1) the description, at page 6 of the government's brief, of the scope of the allegations of plaintiffs' complaint in the district court, and (2) the statement, in footnote 8 on pages 8-9 of that brief, that, as a result of the temporary interruption of the trial proceedings by these interlocutory appeals, "plaintiffs never established any particularized damages resulting from the legal violations found."

With regard to the first of these matters, the federal respondents' description of plaintiffs' complaint seems to suggest that plaintiffs' allegations of the damage arising from the defendants' pumping activities in the Delta have encompassed only "adverse effects upon wildlife, fisheries and recreation" caused by "degradation in water quality." This description is incomplete. An accurate account of the full scope of plaintiffs' claims would also include a reference to the further allegation that the defendants' water diversions "directly affect navigation in said waters and the operation in said waters of pleasure boats,

ships and other vessels" by plaintiffs and others utilizing the Delta channels for navigational pursuits (Jt. App. 22a).

The federal defendants' statement that "plaintiffs never established any particularized damage resulting from the violations found" is likewise somewhat misleading. It is true that the defendants' exercise of their right to pursue interlocutory appeals from the preliminary injunction entered at the conclusion of the first phase of the bifurcated trial has temporarily foreclosed plaintiffs from presenting all of the available evidence of the precise nature and magnitude of the damages suffered by them. However, even the truncated record developed thus far includes ample evidence to the effect that defendants' violations of the Rivers and Harbors Act have caused definite, quantifiable and severe injury to commercial fishing and recreational fishing and hunting, and to the capacity of the Delta channels to accommodate recreational and commercial navigation (Pet. App. 88-91; Jt. App. 95a; PX 7, 11, 14, 17); and the district court has expressly found that plaintiffs are among those engaged in these adversely affected activities (Pet. App. 67-68).

Although plaintiffs do not similarly adopt the separate statements of the case previously submitted in the two briefs filed by petitioners State of California and Kern County Water Agency et al., plaintiffs do not dispute the literal accuracy, as opposed to the relevancy, of the factual assertions appearing in either of

those statements. One potentially confusing ambiguity in the statement submitted by petitioner State of California, however, should be noted. At various points in its Statement of the Case, the State refers to the proposed Peripheral Canal project in such a way as to suggest that a determination of the legal status of this project is still an issue in these proceedings (Brief for California, page 10 and note 6; see also the State's reference to section 9 of the Rivers and Harbors Act, 33 U.S.C. §401, which the district court found to be applicable only to the Peripheral Canal, as one of the "statutes involved" in these cases). As the court of appeals noted in its opinion (Pet. App. 8) and as the federal respondents have previously informed this Court (Brief for Federal Respondents, page 9 n.11), no appeal was taken by the State from the portion of the district court's order requiring Corps of Engineers approval for this proposed expansion of the State's diversion facilities. Accordingly, this matter was not considered by the court of appeals, and no challenge to this aspect of the district court's order is now before this Court.*

* It might also be noted that, if the Peripheral Canal had not been excluded from further consideration in these proceedings, most of the State's recital in its brief regarding the impact of its activities on the navigable capacity of the affected waterways would be rendered grossly inaccurate. Although the State makes much of the fact that the substantial lowering of water levels caused by the present operation of the Delta and Tracy pumping plants has occurred primarily in the (contd.)

SUMMARY OF ARGUMENT

Section 12 of the Rivers and Harbors Act of 1899 includes a general and unqualified grant to the district courts of jurisdiction to enjoin violations of section 10 of the Act. The further grant of enforcement authority to the Attorney General in section 12 includes no statement or indication that this authority is intended to be exclusive. The language of the Act thus suggests, though it does not compel, the conclusion that private relief is authorized for any violation of section 10.

The legislative history of the Act and the background of its enactment manifest a very clear understanding on the part of Congress that the provisions of section 10 would indeed be privately enforceable. The pre-existing common law afforded a right to injunctive relief to any person "specially injured" by an unlawful obstruction to a navigable waterway, and this right had been frequently enforced in both state and federal

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(footnote contd.) immediately adjacent navigable channels of the Delta itself and was not found to exceed (at a "minimum") one or two inches in the major commercial shipping channels of the Sacramento and San Joaquin Rivers (Pet. App. 89-90), construction and operation of the proposed Peripheral Canal, according to the district court's unchallenged findings, would divert "as much as 80 per cent" of the Sacramento River's entire flow during certain seasons of the year, in addition to causing various other severe effects on navigation, such as the complete damming of one tributary stream (Pet. App. 92).

courts in a long series of cases which Congress expressly took into account in enacting this statute. The principal purpose of the 1899 Act and its 1890 predecessor was simply to overrule a decision of this Court to the effect that an obstruction to navigation was not unlawful within the meaning of the rule applied in these cases when it had been authorized by state law and when Congress had enacted no specific countervailing prohibition. It would have been extraordinary if, in the very course of enacting the necessary federal prohibition and strengthening its enforceability by authorizing criminal prosecutions and civil suits by the Attorney General, Congress had simultaneously abrogated the principal pre-existing remedy of a private injunctive action which lay at the foundation of the entire body of law on which the new legislation was based. The "silence" of the statute on this issue is thus properly explained as an understandable omission by Congress to undertake the superfluous gesture of expressly "creating" an already existing remedy and as a mere failure to belabor the obvious. The record of the legislative debates on the statute is completely consistent with this explanation, and no evidence exists to support any other version of the legislative intent.

From shortly after its enactment to the present day, the lower federal courts have frequently and consistently permitted the Act to be enforced by private parties. The opinions of this Court have likewise

frequently intimated that the Act is privately enforceable. Congress's failure to take any action to correct this consistent judicial interpretation is further evidence of its intention to authorize a private remedy.

All of the other factors that are currently deemed relevant in determining the existence of a private remedy for violation of a federal statute favor the implication of such a remedy in this case. The common law background of the 1899 Act demonstrates that its primary purpose was to afford "special benefit" to the class of persons, such as respondents, who have been "specially injured" by obstructions to the nation's navigable waterways within the meaning of the pre-existing common law rule. No interference with the simultaneous public administration of the Act can possibly arise from affording the private relief sought in this case, which consists merely of enforcement of the offending parties' duty to submit their activities to review by the responsible public agency and does not encompass any effort to override or second-guess that agency's ultimate determination of the legality of those activities. Indeed, the preservation of a private remedy will substantially advance the public interest in enforcement of the Act because (1) private parties injured by obstructions to navigation which the Corps of Engineers has failed to review or approve will otherwise be relegated to common law nuisance actions

in the state courts, with the undesirable result that regulation of the interstate system of navigable waterways will come to depend on the vagaries of the disparate laws of the several states, and (2) the fact that the federal Water and Power Resources Service is itself, as this case illustrates, one of the most likely potential violators of the Act might be expected to deter the Corps of Engineers and the Attorney General from enforcing the statutory prohibitions with their full intended vigor in many situations unless those actually injured by the Service's unlawful activities are accorded the legal right to protest the inaction of these enforcement authorities. Finally, protection of the nation's system of navigable waterways, far from being a subject "traditionally relegated to state law," has been, at least since 1899, an area of exclusive federal competence in which state concerns have universally been forced to yield to the necessity for uniform national policies enforceable by the federal courts.

The court of appeals' construction of the substantive terms of section 10 of the Act is not only correct, but is the only interpretation which would make the statute operate in a sensible manner to effectuate its purposes. Petitioners' contention that a court must first determine whether an "unreasonable obstruction" to navigation actually exists before the Corps of Engineers is authorized to undertake its determination of the identical issue would render futile the entire

administrative enforcement scheme mandated by the statute. Petitioners' alternative argument that obstructions to navigation authorized by a state are entitled to some unspecified form of exemption from the ordinary operation of the statute flies in the face of the entire history and purpose of the 1899 Act as well as several specific contrary holdings of this Court. The further assertion that the statute cannot be applied to a diversion of the flow of a navigable waterway unless the streambed of the waterway is physically disturbed has likewise been rejected by this Court and would similarly transform the statute into an exercise in futility. Finally, the contention of the water-agency-petitioners that the statutory requirement of Corps of Engineers review of the challenged facility, even if applicable, was satisfied in the course of the State's belated procurement of a permit for an ancillary addition to that facility is, if not disingenuous, at least devoid of any support in the record.

ARGUMENT

I. These Respondents Have a Right to Maintain an Action in a Federal Court to Enjoin Violations of the Rivers and Harbors Act of 1899.

A. The Language of the Act Suggests the Existence of a Private Remedy.

As both the federal defendants and the intervening water agencies have previously pointed out in their briefs, the starting point for determining whether a violation of a federal statute may be redressed in an

action brought by private parties is the language of the statute itself (Brief for Water Agencies, page 11; Brief for Federal Respondents, page 16). Touche, Ross & Co. v. Redington, 442 U.S. 560, 568 (1979); Cannon v. University of Chicago, 441 U.S. 677, 689 (1979). Accordingly, the initial focus of the Court's effort to resolve that issue in this case must be those provisions of section 12 of the 1899 Act (33 U.S.C. §406) which expressly prescribe the civil remedies for violations of the Act's substantive prohibitions. The language of those remedial provisions consists in its entirety of the following few words (33 U.S.C. §406):

> [T]he removal of any structures or parts of structures erected in violation of the provisions of the said sections may be enforced by the injunction of any district court exercising jurisdiction in any district in which such structures may exist, and proper proceedings to this end may be instituted under the direction of the Attorney General of the United States.

Altough the statute thus expressly confers jurisdiction on the district courts to enjoin all violations of the Act and also permits the Attorney General to seek such relief on behalf of the United States, it neither affirms nor denies that private parties as well may seek to enforce the equitable remedies which it authorizes the courts to grant. The question thus becomes: What does the statutory language imply in this regard? When Congress said that the federal courts might enjoin violations of the Act "and" that the Attorney General might seek such injunctive relief, did it mean that the

courts could grant equitable redress to any injured party and in addition the Attorney General was authorized to seek such relief on behalf of the general public, or did it mean that the equitable jurisdiction thus conferred could be exercised only at the request of the Attorney General? To put the same question another way: What is to be implied from Congress's silence with respect to the rights of private parties injured by the prohibited conduct? Did Congress omit an express prescription of these rights because it assumed that their existence was apparent from the pre-existing law and that only the Attorney General's authority to sue needed to be expressly conferred, or did it omit this prescription because it contemplated that no private remedy should be allowed?

This Court's only previous recent effort to derive answers to these sorts of questions from very similar statutory language occurred in Allen v. Board of Elections, 393 U.S. 544 (1969).* There, as here, the statute

* All of the Court's other recent decisions on private rights of action have involved very different statutory terminology. Thus, in National R.R. Passenger Corp. v. Passengers Assn. (Amtrak), 414 U.S. 453 (1974), the statute provided that the district court "shall have jurisdiction, except as otherwise prohibited by law, upon petition of the Attorney General or, in a case involving a labor agreement, upon petition of any employee affected thereby," thus plainly excluding jurisdiction to afford relief to other parties. 414 U.S. at 457. Similarly, in Securities Investor Protection Corp. v. Barbour, 421 U.S. 412 (1975), the remedial provision stated only that "the Commission may apply to the district court. . . for an (contd.)

conferred on the district courts "jurisdiction of proceedings instituted pursuant to this section," and then went on, without addressing the question of private remedies, to provide separately that the Attorney-General "may institute . . . an action" to enforce the substantive requirements of the statute. 393 U.S. at 555 n.18, 556 n.21. In the course of upholding a private remdey for violation of

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(footnote contd.) order" enjoining a violation of the statute. 421 U.S. at 417-18. In Cort v. Ash, 422 U.S. 66 (1975), the statute prescribed solely criminal penalties and granted no civil jurisdiction or remedies whatsoever. 422 U.S. at 74. In Santa Clara Pueblo v. Martinez, 436 U.S. 49 (1978), the statute authorized relief only by a writ of habeas corpus and contained no other jurisdictional or remedial grant. 436 U.S. at 60. In Cannon v. University of Chicago, supra, the statute provided no judicial remedy of any kind, civil or criminal, and instead mandated enforcement of its provisions solely by administrative termination of federal financial assistance to the offending institutions. 441 U.S. at 684 n.4. In Touche, Ross & Co. v. Redington, supra, the statute contained only reporting requirements and again prescribed no judicial remedy at all, civil or criminal, for the types of misstatements in the required reports that were relied upon by the plaintiffs as the basis for their claim. 442 U.S. at 569. Finally, in Transamerica Mortgage Advisers, Inc. (TAMA) v. Lewis, 444 U.S. 11 (1979), the statute provided only that agreements violative of its terms should be "void," and authorized no remedy for its transgression other than the general power conferred on the Securities Exchange Commission "in its discretion" to seek injunctions against any violations of the Act. 444 U.S. at 16-18. In Cannon, supra, and TAMA, supra, the Court nevertheless managed to find that a private remedy could be implied solely from the substantive prohibitions of the statute. 441 U.S. at 717; 444 U.S. at 18-19.

the statute, this Court expressly rejected the argument that the last quoted provision implied that the Attorney General's enforcement authority was exclusive, finding instead that "the specific references to the Attorney General were included to give the Attorney General power to enforce what otherwise might be viewed as 'private' rights." Id. at 555 n.18.

The analysis in the Allen opinion provides an initial guide for the Court's interpretation of the nearly identical* statutory language presented here.

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* It is true that the grant of jurisdiction and the grant of executive enforcement powers appeared in separate sections of the statute in Allen, whereas here the two provisions are separated only by a comma and the word "and." It is certainly not apparent that any significance should be accorded to this distinction. For what it is worth, however, it should be noted that these two clauses of section 12 were separated by a semicolon rather than a comma in the corresponding section of the 1890 statute that was the direct predecessor of the Rivers and Harbors Act. Section 10 of the 1890 Act (26 Stat. 954-55) provided as follows:

> The creating or continuing of any unlawful obstruction in this act mentioned may be prevented and such obstruction may be caused to be removed by the injunction of any circuit court exercising jurisdiction in any district in which such obstruction may be threatened or may exist; and proper proceedings in equity to this end may be instituted under the direction of the Attorney-General of the United States.

All parties to this proceeding are apparently in agreement that the 1890 version of the statute must be taken as a more revealing indication of Congress's underlying intentions than its 1899 successor, because, as will be seen below, only the former enactment received (contd.)

Admittedly, the Court in Allen did not rest its holding solely on its literal parsing of this language. Nor do respondents here contend that such statutory phraseology necessarily implies a private right of action. On the face of it, however, this sort of apparently unqualified grant of general equitable jurisdiction to the district courts, followed only by a provision for executive enforcement which itself contains no hint that it is intended as a limitation on the general jurisdictional grant, is certainly supportive of the possibility that such rights may indeed exist. As the Court held in Allen, this type of legislative language is at least sufficient to justify a finding that Congress intended to permit private enforcement of the law when it is reinforced by a legislative history that is also indicative of such an intention. As respondents will demonstrate in the next section, the legislative history of the Rivers and Harbors Act is replete with such indications.

Far less revealing of Congress's intentions in this regard than these remedial provisions of the Rivers and Harbors Act is the language of the substantive prohibition which petitioners have been found to have violated. Section 10 of the Act merely provides that "it shall not be lawful" to engage in specified activities without a permit from the Corps of Engineers,

(footnote contd.) any substantive attention by the Congress, the later Act having been presented and accepted without debate as a mere compilation of prior statutes that would effect no change in the content of the law. 32 Cong. Rec. 2296-97.

and does not purport to address in any way the question of remedies for its violation, which are, as seen above, specifically prescribed by a separate section of the Act. 33 U.S.C. §403. The briefs of the federal defendants and the intervening water agencies nevertheless attach great significance to the particular wording of this prohibition, arguing that it should be taken as a purportedly clear indication of Congress's intention to withhold a private right of action. They rely for this view upon a passage in this Court's opinion in Cannon v. University of Chicago, supra, in which the Court observed that a prohibition phrased in this manner - that is, as a bare proscription of certain conduct which grants no right to any particular class of individuals to be protected from the proscribed conduct - is less indicative of an intention to authorize private suits than a statute which does expressly confer such a right. Id., 441 U.S. at 690-92.

These parties' reliance on this aspect of the Cannon decision is entirely misplaced in the present context. Even if one does not subscribe to Justice Powell's dissenting view in Cannon that the Court's effort to divine Congress's intentions regarding remedies from differences in the phrasing of its substantive proscriptions "gives undue significance to essentially stylistic differences in legislative draftsmanship" (441 U.S. at 740 n.13), there are at least three compelling reasons why the Cannon analysis must be deemed inapposite to this case. First, the Court in Cannon

was construing a statute which provided no judicial remedy whatsoever for its violation, so that an intent to confer a remedy on a class of private individuals had to be derived, if at all, solely from the language of the substantive sections of the law. Where, as here, the statute goes on to set forth a specific remedial scheme, the language of the remedial provisions, not the substantive prohibitions, has uniformly been deemed to be the proper focus of the analysis. See Cort v. Ash, supra at 74-75; SIPC v. Barbour, supra at 417-19; National R.R. Pass. Corp. v. Passengers Assn., supra at 456-57. Secondly, the use of the "shall not be lawful" language in the Rivers and Harbors Act is specifically and completely explained by a factor other than a congressional intention to withhold private remedies for violations of the Act. As will be shown in greater detail below, the Act was intended as a legislative overruling of a decision of this Court (rendered, significantly, in a suit between private parties) in which the Court had held that "there is no common law of the United States which prohibits obstructions and nuisances in navigable rivers." Willamette Iron Bridge Co. v. Hatch, 125 U.S. 1, 8 (1888). The phrase "shall not be lawful" was simply a quite natural and direct way of expressing the contrary of this holding by authoritatively propounding the "law of the United States," and accordingly cannot be taken as implying anything one way or the other on the separate question of remedies. See 21 Cong. Rec. 8605 (remarks

of Sens. Edmunds and Dolph). Finally, there is no need, in any event, to resort to any form of speculation about the implications of the Act's proscriptive language in order to determine Congress's intention to benefit a particular class of individuals in the present context, because its intention in that regard is made perfectly clear by ample other evidence in the legislative history of the Act, all of which will be fully described below. For all these reasons, and despite whatever usefulness it may have possessed in Cannon, therefore, emphasis upon the phraseology of the prohibitory provision of the statute does not advance the analysis in this case.*

In sum, the language of the Rivers and Harbors Act, while not totally unrevealing, is incapable by itself of resolving the enigma of Congress's intentions regarding private remedies. As in Allen, supra, the unqualified grant of general equitable jurisdiction to the district courts and the absence of any indication that the executive enforcement authority conferred by

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* Another element of the language of the Act somewhat halfheartedly invoked by the other parties in support of their effort to preclude a private remedy is the statement in section 17 of the Act that "The Department of Justice shall conduct the legal proceedings necessary to enforce the provisions of" the Act. 33 U.S.C. §413. Even a cursory reading of the remainder of that section, however, reveals that the term "legal proceedings" refers exclusively to the criminal prosecutions that are authorized by various sections of the Act.

the Act was intended to be exclusive are at least suggestive that simultaneous private enforcement was contemplated. Concededly, however, these indications do not by themselves compel such a finding. Resort must therefore be had to a detailed review of the background and history of the congressional deliberations that led to the law's enactment.

B. The Common Law Background and Legislative History of the Act Demonstrate Indisputably that Congress Did Not Intend to Abrogate the Pre-Existing Right of any Person Injured by an Unlawful Obstruction to a Navigable Stream to Obtain an Injunction Against Continuation of the Obstruction.

The Rivers and Harbors Act of 1899 emanates from an era very different from our own - an era in which, among other important differences, nearly all civil litigation was among private parties and the vast complex of government regulatory agencies which exists today was an unknown phenomenon. It would be easy, therefore, by reviewing nothing more than the bare record of the legislative debates on this statute, to misunderstand the content and meaning of those debates and, in particular, to misinterpret the fact that, as will be seen below, none of the legislators, in the course of the debates, actually addressed directly or expressly the issue of whether a "private right of action" should or should not be available to enforce the terms of the statute. If such a misunderstanding is to be forestalled, any account of the legislative history of the Act must necessarily be preceded by a

rather detailed consideration of the contemporary legal climate and of the common law principles that were perceived by the Congress as furnishing the legal context for its enactment of this legislation. See Cannon v. University of Chicago, supra at 696-98, 702-3.

1. The Common Law Background

a. The Injunctive Remedy for Obstructions to Navigation

In the common law of the last century, it was well settled that any obstruction of a navigable stream, if undertaken without specific legal authorization, was a public nuisance and, further, that it would be enjoined at the suit of any private party to whom it had caused particular injury. E.g., Gilman v. Philadelphia, 70 U.S. 713, 722-24 (1866); Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. 518, 563 (1851); Mayor, etc., of Georgetown v. Alexandria Canal Co., 37 U.S. 91, 97-99 (1838); Piscataqua Navig. Co. v. New York N.H. & H.R. Co., 89 Fed. 362, 363, 365 (D.Mass. 1898), revd. in part on other grounds 101 Fed. 92 (1st Cir. 1901); Woodruff v. North Bloomfield Gravel Mining Co., 18 Fed. 753, 769-71 (C.C. Cal. 1884); Works v. The Junction R.R., Fed. Case No. 18,046, 30 Fed. Cas. 626, 627 (C.C. Ohio 1853); Lansing v. Smith, 4 Wend. 9, 25 (N.Y. 1829); Hughes v. Heiser, 1 Bin. 463, 465 (Pa. 1808). See, generally, Pollock, Torts 488-90 (Amer. ed. 1894); Smith, Private Action for Obstruction to Public Right of Passage, 15 Col.L.Rev. 1 (1915). Although some jurisdictions adopted rather stringent

tests regarding the kind and degree of injury that would suffice to sustain such an action (e.g., Davis v. County Commissioners, 26 N.E. 848, 849-50 (Mass. 1891)), the basic right to private relief was never questioned, and the federal courts appear to have unanimously adopted the more liberal rule of standing pursuant to which any individual who had suffered any form of actual injury other than the abstract injury to the right of free travel enjoyed by the public at large would be entitled to injunctive relief. Pennsylvania v. Wheeling & Belmont Bridge Co., supra at 566; Piscataqua Navig. Co. v. New York, N.H. & H.R. Co., supra at 363, 365; Woodruff v. North Bloomfield Gravel Mining Co., supra at 769. See Carver v. San Pedro L.A. & S.L. R.R. Co., 151 Fed. 334, 335-36 (S.D.Cal. 1906); Smith, supra at 16. Under this rule, injunctions were granted, not only to persons who had actually been prevented from navigating an obstructed stream, but also, for example, to a merchant whose shipping costs had been increased by the obstruction (Works v. The Junction R.R., supra), to a proprietor of connecting canals who had suffered a reduction of its toll revenues by reason of the unlawful obstructions (Pennsylvania v. Wheeling & Belmont Bridge Co., supra) and to land-owners forced to pay increased taxes in order to maintain public levees for protection against the flooding caused by the obstructions (Woodruff v. North Bloomfield Gravel Mining Co., supra).

b. Application of the Remedy in the Decisions of This Court

This equitable remedy against obstructions to navigation naturally became an important weapon of the commercial navigation interests in what Charles Warren has called "the great contest between the railroads and the steamboats in their struggle for supremacy in the development of modern means of transportation." 2 Warren, The Supreme Court in United States History 235 (1922). Because of the earlier establishment of federal supremacy in the field of navigation (Gibbons v. Ogden, 22 U.S. 1 (1824)) and the system of state franchising of railroads that prevailed prior to the enactment of the Interstate Commerce Act in 1890, this contest, and this judicial weapon in the contest, also became entwined in the great constitutional dispute that was then being waged over the question of the self-executing character of the Commerce Clause and the breadth of the federal commerce power. See Warren, supra at 134-38, 152-55, 168-82, 234-41. In view of the nature and importance of these issues and interests, it is not surprising that a significant proportion of the numerous cases filed during this period invoking this particular form of equitable relief* were finally brought before

* The government's brief refers to certain "rare occasions" on which private parties had sought to enjoin obstructions to navigation prior to 1890. Although neither the government nor these respondents have conducted any statistical survey, one gains the distinct impression, from even a casual perusal of the appellate reports and scholarly surveys of (contd.]

this Court for ultimate resolution. E.g., Willamette Iron Bridge Co. v. Hatch, supra; Huse v. Glover, 119 U.S. 543 (1886); Hamilton v. Vicksburg, Shreveport & Pac. R.R. Co., 119 U.S. 280 (1886); Cardwell v. American River Bridge Co., 113 U.S. 205 (1885); Escanaba & Lake Michigan Transp. Co. v. City of Chicago, 107 U.S. 678 (1883); Pound v. Turck, 95 U.S. 459 (1878); Gilman v. Philadelphia, supra; Pennsylvania v. Wheeling & Belmont Bridge Co., supra; Mayor, etc. of Georgetown v. Alexandria Canal Co., supra.

Of these cases, the most important for our present purposes is the well-known "Wheeling Bridge Case," Pennsylvania v. Wheeling & Belmont Bridge Co., supra. Although possessing great historic significance in its own right, the case is especially important in our present context because it marked one of the relatively few instances in which the standing of an injured party to maintain an action of this kind, which was otherwise so well settled as to require no reassurance, was actually questioned and expressly addressed. In that case, the plaintiff State of Pennsylvania was suing, not as a sovereign, but as a proprietor of certain canals and other transportation works whose revenues had allegedly declined by reason of the curtailment of navigation caused by the offending bridge. Id., 54

(footnote contd.) the period, that private nuisance actions of this precise kind must have comprised, in both numbers and importance, a sizable portion of the total docket load of the nineteenth century courts of equity. See generally, Smith, supra.

U.S. at 556-57, 559-61. See 2 Warren, supra at 234. Pointing out that the state was not the operator of any of the ships or craft that had actually been prevented from passing the bridge, the defendants argued that any indirect effect of this obstruction on its other commercial activities was not a sufficient "special injury" to confer standing upon it to maintain this type of action. In the course of rejecting this contention and upholding the state's standing to sue, this Court provided the following reaffirmation of the existence, content and scope of this equitable remedy (54 U.S. at 604-5, 606-7):

> An indictment at common law could not be sustained in the federal courts by the United States, against the bridge as a nuisance, as no such procedure has been authorized by Congress. But a proceeding, on the ground of a private and an irreparable injury, may be sustained against it by an individual or a corporation. Such a proceeding is common to the federal courts, and also to the courts of the State. The injury makes the obstruction a private nuisance to the injured party; and the doctrine of nuisance applies to the case where the jurisdiction is made out, the same as in a public prosecution. If the obstruction be unlawful, and the injury irreparable, by a suit at common law, the injured party may claim the extraordinary protection of a court of chancery.
>
> Such a proceeding is as common and as free from difficulty as an ordinary injunction bill, against a proceeding at law, or to stay waste or trespass. The powers of a court of chancery are as well adapted, and as effectual for relief in the case of a private nuisance, as in either of the cases named.
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> . . .

> Congress might punish such an act criminally, but until they shall so provide, an indictment will not lie in the courts of the United States for an obstruction which is a public nuisance. But a public nuisance is also a private nuisance, where a special and an irremediable mischief is done to an individual.
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> In the case of the City of Georgetown v. The Alexandria Co., 12 Peters, 98, this court say: "The Court of Equity, also, pursuing the analogy of the law, that a party may maintain a private action for special damages, even in case of a public nuisance, will now take jurisdiction in case of a public nuisance, at the instance of a private person, where he is in imminent danger of suffering a special injury, for which, under the circumstances of the case, the law would not afford an adequate remedy."

This court thus provided a clear confirmation of the availability of private relief against obstructions to navigation, a principle which, as will be shown below, was never again to be called into serious question in any of its subsequent decisions. The passage just quoted is also noteworthy, for reasons which will also appear below, for its incidental dictum that no similar right to relief could be asserted by a public enforcement officer in the absence of express legislative authorization (see also the subsequent opinion of the Attorney General to the same effect, 15 OAG 526 (1876)).

Having thus resolved the issue of the plaintiff's right to assert its claim, the Wheeling Bridge opinion then addressed the further question of whether the obstruction created by the defendant's bridge could be found to be unlawful in the face of the fact that it

had been expressly sanctioned by a Virginia statute. The Court gave an affirmative answer to that question as well, holding that Congress, in the exercise of its superior authority over regulation of interstate navigation, had implicitly condemned any obstruction of the river by granting licenses to steamboat operators and by approving an interstate compact which provided that "navigation of the River Ohio . . . shall be free and common to the citizens of the United States." Id., 54 U.S. at 605. It was this latter aspect of the Court's decision that was destined to be repudiated in a series of subsequent decisions which eventually provided the direct impetus for the Rivers and Harbors Act.

The Wheeling Bridge decision marked both a temporary zenith for the expansionist view of the federal commerce power and the swan song of the commercial navigation interests who had sought to resist any accommodation of waterborne commerce with the burgeoning system of interstate railways. See 2 Warren, supra at 235-36. Over the next four decades, the Court's holding on the substantive issue of the legality of state-authorized obstructions to navigation was expunged by a long series of decisions in which the Court consistently yielded to the growing reality "that bridges . . . are means of commercial transportation, as well as navigable waterways, and that the commerce which passes over a bridge may be much greater than would ever be transported on the water it obstructs," and consistently subordinated any notion of an implied constitutional

preference for waterborne shipping to the states' "municipal power to weigh the considerations which belong to the subject, and to decide which shall be preferred, and how far either shall be made subservient to the other." Gilman v. Philadelphia, supra at 729. Accord, Willamette Iron Bridge Co. v. Hatch, supra at 10; Huse v. Glover, supra at 548-49; Hamilton v. Vicksburg, Shreveport & Pac. R.R. Co., supra at 281-82; Cardwell v. American River Bridge Co., supra at 208-10; Escanaba & Lake Michigan Transp. Co. v. City of Chicago, supra at 683; Pound v. Turck, supra at 462-63. In these cases, the Court ruled, contrary to the holding in Wheeling Bridge, that federal licensing regulations and generalized federal guarantees of "free" navigability were not sufficiently direct expressions of the congressional will to justify condemnation of locally authorized projects that might obstruct navigation. E.g., Willamette Iron Bridge Co. v. Hatch, supra at 12, 14-15; Huse v. Glover, supra at 547-48; Hamilton v. Vicksburg, Shreveport & Pac. R.R. Co., supra at 284-85; Cardwell v. Amer. Bridge Co., supra at 211-12; Escanaba & Lake Mich. Transp. Co. v. City of Chicago, supra at 689-90. That being so, and there being no more specific congressional enactment prohibiting such obstructions, the Court concluded in each of these cases that there was no federal substantive law whatsoever that would prevent the states from authorizing whatever obstructions they pleased to the nation's system of navigable waterways.

E.g., Willamette Iron Bridge Co. v. Hatch, supra at 8, 10; Hamilton v. Vicksburg, Shreveport & Pac. R.R. Co., supra at 281-82; Escanaba & Lake Mich. Transp. Co. v. City of Chicago, supra at 683, 690; Gilman v. Philadelphia, supra at 730-32. This was of course the particular aspect of these decisions that eventually provoked the congressional reaction manifested in the Rivers and Harbors Act.

For present purposes, however, the significant feature of this reversal of judicial positions is that it did not embody any repudiation of, or even cast any doubt upon, the Wheeling Bridge opinion's express adoption of the basic remedial rule that, if an obstruction could be shown to be unlawful, a private plaintiff would have a right to maintain an action to abate it. Each of these decisions, instead, turned solely on the separate question whether the challenged obstruction, though concededly actionable if unlawful, was in fact unlawful, and based its negative answer to that question on the purely substantive grounds recited above. Willamette Iron Bridge Co. v. Hatch, supra at 8, 10; Huse v. Glover, supra at 547-49; Hamilton v. Vicksburg, Shreveport & Pacific R.R. Co., supra at 281-82, 284-85; Cardwell v. American River Bridge Co., supra at 208-12; Escanaba & Lake Michigan Transp. Co. v. City of Chicago, supra at 687-88; Pound v. Turck, supra at 464; Gilman v. Philadelphia, supra at 730-732. Indeed, in its opinion in Gilman v. Philadelphia, supra, which was the decision that actually initiated this constitutional

reversal, the Court went out of its way to point out that, while it was about to reject the substantive holding of Wheeling Bridge, it had no occasion to question that decision's enunciation of the basic equitable principle on which the plaintiff based his standing to maintain the action. On that issue the Court said (70 U.S. at 722-24):

> At the threshold of the investigation we are met by the objection from the defendants, that the complainants, "not being specially interested in navigation, cannot intervene for its protection." It is said, "that they are not the owners of licensed coasting vessels, and are not pilots nor navigators."
>
> As regards this objection, the case is not essentially different in principle from the Wheeling Bridge case, 13 How. 553.
>
> The further objection was also taken in that case, that if a nuisance existed, it was of a public nature, and was an offense against the sovereignty whose laws were violated, and that the sovereign only could intervene for the correction of the evil.
>
> It was answered by the court, that wherever a public nuisance is productive of a specific injury to an individual, he may make it the foundation of an action at law, and if the injury would be irreparable, that a court of equity will interpose by injunction.
>
> . . .
>
> The law upon the subject is learnedly and ably examined. The objections were overruled. Considerations of fact, of the same character with those adverted to, exist in the case before us, and the reasoning and conclusions there are alike applicable in both cases.
>
> . . .

> This brings us to the examination of the merits of the case.

From that point forward, no further question was raised in any of these cases, all of which were private actions, regarding the plaintiff's standing to maintain the suit. The only other bare mention of that issue occurs in a single sentence in the lower court's opinion in the last of these cases, Willamette Iron Bridge Co. v. Hatch, supra, in which the circuit court had stated:

> If then, this bridge, in its construction or effect, is in conflict with either of these acts of Congress, it is so far unlawful, and if injurious in its operation to the rights of the plaintiffs, is a nuisance, and may be prevented or abated.

Hatch v. Wallamet Iron Bridge Co., 6 Fed. 326, 331 (1881), revd. on other grounds 125 U.S. 1 (1888). This Court took no exception to this statement of the remedial rule by the lower court, and instead expressly noted that the sole question being decided by it was "whether the erection of a bridge over the Willamette River at Portland was a violation of said Act of Congress [admitting Oregon to statehood on condition 'that all the navigable waters of said state shall be common highways, and forever free . . .'], " a question of purely substantive law to which the Court ultimately gave a negative answer. Id., 125 U.S. at 8. Thus, by this stage, the basic right of an injured private party to maintain an action to enjoin an unlawful obstruction to navigation had clearly attained the status of an unquestioned assumption in the minds of counsel and of this Court.

This last decision, though otherwise an unremarkable member of the long series of decisions that accomplished the demise of the substantive holding of the Wheeling Bridge case, was to acquire further significance by reason of the incidental fact that the losing plaintiff had been represented in this Court by a United States Senator, one J.N. Dolph of Oregon. Id., 125 U.S. at 2; 21 Cong. Rec. at 8605. Realizing that, by his own later admission, "the Supreme Court had anticipated the decision" against his client by its earlier decisions "in other cases, notably The City of Chicago v. The Escanaba Company" (21 Cong. Rec. 8605), he introduced in the Senate, while the Willamette Bridge case was still pending before this Court, the legislation that eventually resulted in the reversal of his client's defeat by the enactment of the Rivers and Harbors Act. S. 27, 50th Cong., 1st Sess. (1887); S. Rep. No. 224, 50th Cong., 1st Sess. (1888). The history of Congress's consideration and eventual enactment of what shortly became known as the Dolph Bill (see 21 Cong. Rec. 8685) is the subject of the next section of this brief. First, however, it is appropriate to summarize the foregoing account of the common law background of this legislation, and to assess its precise significance in the light of this Court's current standards for evaluating congressional intentions regarding private enforcement of federal law.

c. Implications of This Historical Background

The importance of pre-existing law in determining legislative intent was exhaustively reviewed by this Court only last year in Cannon v. University of Chicago, supra. In that case, which involved a statute prohibiting sex discrimination, the case law preceding enactment of the statute had allowed a private right of action for violation of a similar earlier statute proscribing racial discrimination, but Congress, in enacting the new prohibition against sex discrimination, had failed to address the issue of remedies for its violation. The Court held that a private right of action was nevertheless to be implied from the latter enactment, reasoning that it is "realistic to presume that Congress was thoroughly familiar with these unusually important precedents" authorizing a private right of action under the earlier statute, and that "the absence of legislative action to change" those precedents should therefore be taken as proof that Congress "expected its enactment to be interpreted in conformity with them." 441 U.S. at 698-99, 702-3. This approach was subsequently reaffirmed in Transamerica Mortgage Advisers, Inc. v. Lewis, supra, where the Court held that, when Congress enacted legislation declaring certain investment contracts "void" but providing no remedy, it should be deemed to have taken account of the pre-existing system of equitable remedies, and accordingly must have "intended that the customary legal incidents

of voidness would follow, including the availability of a suit for rescission or for an injunnction against continued operation of the contracts, and for restitution." 444 U.S. at 19.

These recent decisions place the authority of this Court firmly behind the common sense propositions that the legislative process does not take place in a vacuum and that congressional draftsmen accordingly intend their enactments to be interpreted as interstitial additions to a pre-existing legal fabric unless they expressly state otherwise. More particularly, these decisions hold that new enactments of substantive law are intended to be applied in accordance with the pre-existing scheme of customary remedies unless the legislation or the legislative history expressly indicates the contrary.

These principles in turn determine the direction which the above description of the legal background of the Rivers and Harbors Act must give to the examination of the legislative history of the Act which follows in the next section. As seen above, the pre-1890 decisions of this Court had clearly established (1) that a private action would lie to enjoin an unlawful obstruction to navigation, but (2) that an obstruction authorized by state law would not be deemed unlawful in the absence of a specific congressional prohibition, and further (3) that specific congressional action would also be necessary to authorize any challenge to such an obstruction by the Attorney General on behalf of the United

States. The statute which Congress enacted against this background expressly addresses the latter two issues but says nothing about the first, and the question has accordingly been presented whether Congress's silence on that score implies an intent to leave the existing remedial scheme in place or to change the law in that regard by abrogating the established remedial rule. The principles enunciated in Cannon, supra, and TAMA, supra, establish that the former answer to this question must be given unless a contrary intent is made to appear affirmatively and clearly from the statute or the legislative history.

This rule must be applied with a special stringency in this case because the otherwise empirically sound presumptions on which it is based are markedly reinforced by the particular background of the legislation at issue here. One does not even need to "presume" that Congress knows the pre-existing case law when, as here, the sponsor of the legislation in question has personally participated in the litigation from which the law developed and when, as will be seen below, he discusses the relevant cases by name with his senatorial colleagues in the very course of the legislative debates. Moreover, it is not only sensible, but virtually compelled by logical necessity, to assume that legislative silence on the question of private remedies does not imply abrogation of a remedy clearly recognized by prior decisional law when, as here, the legislation has been introduced for the specific purpose

of correcting a judicial failure to grant relief to a private plaintiff whose action had been based entirely on that very remedy. In this case, in other words, the usual improbability, noted in Cannon and TAMA, that a change in the law is intended when none has been expressed, is replaced by the virtual impossibility that legislation enacted to reverse particular judicial decisions could somehow be accompanied by an unexpressed intention to revalidate those same decisions by simultaneously abrogating a settled principle of the law of remedies. Something even more convincing than the ordinary clear showing of legislative intent to change the prior law should be demanded of those who would seek to substantiate such an extraordinary hypothesis. As will now be seen, no convincing evidence of any kind tending to support this claim can be derived from the legislative history of the Rivers and Harbors Act, which in fact affirmatively supports the opposite hypothesis.

2. The Legislative History of the Act

a. The Congressional Debates

The legislative history of the Rivers and Harbors Act of 1899 has been described on several prior occasions by this Court, most exhaustively in Justice Harlan's dissenting opinion in United States v. Republic Steel Corp., 362 U.S. 482, 498-503 (1960). See also United States v. Pennsylvania Industrial Chem. Corp., 411 U.S. 655, 663-66 (1973); United States v. Standard Oil Co., 384 U.S. 224, 226-28 (1966). As is there noted,

the history of the Act begins with the introduction of the Dolph Bill (S.27, 50th Cong., 1st sess.) in 1887, continues through the eventual enactment of this bill, with extensive amendments, as the Rivers and Harbors Act of 1890 (26 Stat. 954-55), and culminates in the reenactment of that statute, with minor changes, as part of a general recodification of navigation laws in the form of the Rivers and Harbors Act of 1899 (33 U.S.C. §§401 et seq.). The 1899 Act was presented and accepted without significant debate by the Congress as a mere "compilation" of existing law that changed "not ten words" in the prior statutory scheme. 32 Cong. Rec. 2296-97. All parties to this proceeding are accordingly in agreement that any indications of congressional intent which might be revealed by the Act's legislative history must therefore be found in the congressional deliberations on the 1890 predecessor statute (see Brief for Water Agencies, pages 19-21; Brief for Federal Respondents, page 21 n.13).

The debates on the 1890 statute, which consisted of brief discussions on the floor of the Senate on two consecutive days (21 Cong. Rec. 8601-8, 8684-90), are themselves not extraordinarily revealing. In particular, they contain no express disclosure of a congressional purpose to preserve or deny a "private right of action" to enforce the terms of the Act. The meaning which ought to be attributed to this silence, to the extent it is not already obvious from the preceding discussion of the prior law, will be discussed at a

later point below. First, however, it is appropriate to try to glean from the record of the debates what few indirect indications are available concerning Congress's intentions in this regard.

The first such indication is the clear confirmation of the fact, already noted by this Court in other contexts (United States v. Pennsylvania Industrial Chem. Corp., supra at 663; United States v. Republic Steel Corp., supra at 485-86) and conceded by the federal respondents in their brief (at page 21), that the Act was directly intended as a legislative overruling of the decisions in Willamette Iron Bridge Co. v. Hatch, supra, and its predecessors. In a colloquy among Senators Dolph, Gray and Edmunds, the latter being the author of the amendment that contained the actual language of the remedial provision at issue here, Senator Edmunds expressly confirmed that "it was for that purpose that the amendment . . . was introduced." 21 Cong. Rec. 8605. The compelling significance of this fact, in light of the further fact that Willamette Bridge and all of its predecessors were private actions, will be as obvious to this Court as it was to the court of appeals (Pet. App. 74-75 n.8).

The debates also clearly reveal a thorough awareness, on the part of all the participants, of the content of the pre-existing case law, including the private nature of all these earlier actions and the general availability of a private remedy for unlawful obstructions to navigation. Several of the relevant private actions were cited by

name in the debates (21 Cong. Rec. 8604-5), and one of the senators at one point, in a passage that will be more fully quoted below, expressly summarized the existing remedial rule that, when an unlawful obstruction to navigation was sought to be removed, "the only way in which it can be done under law, under judicial proceedings, is to condemn the [obstruction] as a nuisance. And how is that done? It must be done at the instance of some citizen or a number of citizens combining, who must institute the proceeding at their own expense; . . ." 21 Cong. Rec. 8603. Given these remarks, the principle that congressional silence should be interpreted as an intention to preserve the pre-existing law can be applied even without the benefit of the corollary presumption of congressional familiarity with the prior law. The legislators who enacted the Rivers and Harbors Act were in fact personally familiar with every thread of the legal fabric into which that Act was to be woven.

Finally, the debates provide a clear refutation of the notion, on which both the federal respondents and the intervening water agencies have principally based their arguments on this whole issue, that the statutory provision permitting enforcement of the Act by the Attorney General was intended as an implicit abrogation of the remedial rights of private parties. In the following remarks, which were delivered in opposition to a proposed amendment that would have deleted the Act's criminal enforcement provisions, Senator Vest of

Missouri eloquently expounded the actual congressional perception of the reasons why public enforcement of the Act was needed (21 Cong. Rec. 8603):

> It is a very well known fact that hundreds of bridges are constructed yearly in the United States, without any permission from Congress, over navigable streams under the jurisdiction of the Government.
>
> . . .
>
> Now, suppose there is no authority given to the Secretary of War, if they are obstructions, to remove them, what is the result? The only way in which it can be done under law, under judicial proceedings, is to condemn the bridge as a nuisance. And how is that done? It must be done at the instance of some citizen or a number of citizens combining, who must institute the proceeding at their own expense; and we know very well that that amounts simply to nothing at all. It may occasionally, and that is a very sporadic case, find some individual public-spirited enough and with sufficient means to enter a court of justice as an antagonist to one of these wealthy corporations, but I have never known such a case in my experience, and I hardly think any other Senator has.
>
> . . .
>
> These corporations can go into the court and they can protract litigation until their bridges will stand there indefinitely. The only power that they respect in this country is the power of the General Government. The only way in which you can reach them is through the Federal power.

These remarks concedly show that purely private enforcement of the right to free navigation, as under the pre-existing law, was perceived by the Congress as unsatisfactory. But they also clearly show that it was so perceived, not because private actions were deemed

undesirable, but because, by themselves, they were deemed inadequate for practical reasons to prevent particular obstructions that were being created by certain especially affluent and recalcitrant offenders. It follows, and is also clearly implied in this passage, that public enforcement was intended, not as a displacement of private remedies, but as a supplement that would be effective in those instances where private resources were inadequate to the task. The Senator's stirring expression of admiration for the "public-spirited" private suitors who had thus far waged the battle for freedom of navigation clearly demonstrates, perhaps more effectively than a direct statement to that effect, that Congress's purpose in granting enforcement powers to the Attorney General was to assist these public benefactors, not to thwart them by abolishing their existing legal rights.

Thus, every indication that can be derived from the actual record of Congress's deliberations on the Act supports, in one way or another, the view that existing private remedies were intended to be preserved and utilized as a method of enforcing the Act's substantive prohibitions. Why, then, did none of the congressmen say this in so many words? Why does the legislative history, like the statute itself, appear "silent" when one searches it for an explicit statement that, a "private right of action" is afforded by the Act?

Respondents submit that the answer to this question which clearly emerges from this entire account of the background and history of this Act is that such a statement was plainly unnecessary, and that in fact the proposition was so obvious to the 1890 Congress that any express statement of it would have been viewed as superfluous if not fatuous. It should again be recalled that this was an age when nearly all civil litigation was privately initiated, and that it was administrative enforcement by public officers, not the "private right of action," which was then viewed as an atypical remedy requiring explicit authorization. See Pennsylvania v. Wheeling & Belmont Bridge Co., supra at 604, 606. The foregoing discussion has demonstrated that, to this general perception, there must be added the following specific corroborative facts: (1) that a private remedy for obstructions to navigation was an accepted feature of nineteenth century common law; (2) that the Supreme Court had early reaffirmed and never again questioned the existence of this private remedy - even while it was refusing relief to many suitors on substantive grounds and even while it was denying in dicta the existence of any public remedy that might be invoked by the government - throughout the entire lengthy series of decisions that precipitated the enactment of this legislation; and (3) that the congressmen who passed the Act were thoroughly familiar, through personal involvement and otherwise, with all of these decisions and with their unquestioning acceptance of the principle

of private relief. When all of these factors are taken into account, it is plain that Congress simply would not have seen any need for an explicit statement that private enforcement of this enactment was contemplated. Indeed, against this background, even the bare question whether a "private right of action" was intended to be "implied" from this legislation appears as a curious modern anachronism that would scarcely have been understood by the 1890 Congress.

b. Other Alleged Indications of Legislative Intent

At all events, even if one rejects this interpretation of Congress's silence regarding "private rights of action" and views it instead as simply a case of unrevealing legislative oversight, a private right to enforce the provisions of the Rivers and Harbors Act would still have to be sustained. As noted above, the principle that must guide this examination of the Act's legislative history is that, when prior law has allowed a private remedy for violation of a certain substantive right and Congress then enacts a new substantive prohibition without revealing its intentions regarding private enforcement, it must be presumed to have intended no change in the prior law of remedies and, consequently, to have authorized private enforcement of its new enactment. Cannon v. University of Chicago, supra at 698-703; Transamerica Mortgage Advisers, Inc. v. Lewis, supra at 18-19. If nothing else is clear from the foregoing recital of the background of the Rivers and Harbors Act, it is at least beyond question

that the pre-existing case law allowed private parties to sue to enjoin any obstruction to navigation that could be shown to be unlawful. Even if the legislative history of the Act is viewed as disclosing absolutely nothing of Congress's intentions on the issue, therefore, the legal effect of that lack, by reason of the presumption adopted in Cannon and TAMA, supra, is to require the Act to be interpreted as authorizing private enforcement of its provisions. Cannon, supra at 698-99; TAMA, supra at 18-19. This result could be avoided only by a showing that Congress affirmatively intended to abrogate the prior remedial rule and to foreclose the right to private relief. See id. 441 U.S. at 686 n.7, 699, 703; 444 U.S. at 19. The burden of producing positive evidence of Congress's intentions therefore rests upon those who seek to resist private enforcement.

The federal respondents and the intervening water agencies have sought to satisfy this burden only in a curiously indirect and ultimately unconvincing fashion. They have been unable to point to any evidence of a congressional intention to abolish the private remedy in the record of the actual debates on the 1890 Act, which they barely discuss in their briefs. They have attempted to fill this void solely by resort to inferences allegedly to be drawn from congressional actions taken on two separate legislative proposals at a different session of the Congress. Even if the very remoteness of this sort of evidence, both in time and in subject,

from the central focus of our inquiry did not render it incapable of providing the sort of positive indication of congressional intent required by Cannon and TAMA, supra, both of these items would have to be disregarded in any event because they simply do not show what these parties claim they show.

The first item relied upon by these parties is a Senate amendment to the criminal enforcement section of the original version of the Dolph Bill which was adopted shortly after that bill was first introduced in 1887. Section 5 of the bill (S.27, 50th Cong., 1st sess., section 5), which is quoted in full in the federal respondents' brief (at pages 17-18), originally provided that the criminal fine and penalties prescribed therein were to be enforced and collected by the United States "at the suit of any district attorney of the United States, or at the suit of any person, by information to any district attorney . . . " The amendment changed this language so as to provide for enforcement "by the district attorney . . . at the instance of any person complaining." 19 Cong. Rec. 2338. Ultimately, neither version of the language was enacted, as this section was deleted from the bill before its enactment by the 1890 Congress.

There are at least two clear reasons why this trivial change in the language of a proposal that was never enacted cannot qualify as even a remote indication of a congressional intent to abrogate private civil remedies. In the first place, it is not at all

clear that the amendment would even have effected any real change in the enforcement rights that would have been conferred on private parties by this section. Both before and after the amendment, the prescribed fines were to be collected by, and to inure only to the benefit of, the United States, while private parties had the right, in both versions of the section, to compel such collection by some form of complaint to the district attorney. The only apparent change made by the amendment was in the form of this complaint, which originally was to be a "suit [by] any person, by information to the district attorney" and then became an "action . . . by the district attorney . . . at the instance of any person complaining." If anything was intended by this change other than clarification, it is certainly not apparent from the language, and the lack of any debate or comment accompanying its adoption supports the view that this was indeed its sole purpose. See 19 Cong. Rec. 2338.

Secondly, and more importantly, even if this amendment is interpreted as prescribing a major change in the enforcement rights of private parties, and even if, further, it is taken as evidencing a serious congressional purpose to curtail those rights, the fact remains that the rights thus curtailed would relate solely to the criminal enforcement provisions of the bill, which is a matter wholly separate from the subject of our present concern. Respondents readily concede that, though it was accomplished by means other

than this amendment, the right of private parties to initiate criminal enforcement of the Act was ultimately deleted by the Congress and is not presently conferred by any of the Act's provisions. See 33 U.S.C. §§406, 411, 413. Indeed, respondents will go further and point out that, in the course of the 1890 debates, Congress seriously considered deleting the entire criminal enforcement mechanism, leaving only the civil remedies presently prescribed by section 12 (33 U.S.C. §406). 21 Cong. Rec. 8603, 8606. How any of these events can be deemed probative of a congressional intent to abrogate the private civil remedy, however, is impossible to discern. If anything, they would seem to reinforce the importance of preserving such a remedy, and hence to prove a precisely opposite intention. For this second reason as well, therefore, reliance upon this obscure 1887 amendment to the original bill cannot aid the argument of the federal respondents and the water agencies on this issue.

The second item of alleged evidence of Congressional intent invoked by these parties is Congress's enactment of a certain 1888 law, eventually recompiled in the Bridge Act of 1906 and now codified as 33 U.S.C. §500, which provides that persons causing erosion of private land by the construction of bridges "shall be liable . . . to the persons injured in a sum double the amount of said injury." The federal respondents point to this otherwise completely unrelated statute as evidence that "when Congress wished to create rights of action in

private parties, it knew how to do so" (Brief for Federal Respondents, page 19). Again, however, there are at least two independently sufficient reasons why this argument is unsound.

First, this statute enacts a penal sanction in the form of double damages, not an ordinary civil remedy of the sort involved here. It is only the latter type of remedy which respondents have argued need not be "created" by an express statutory prescription, particularly where it can be demonstrated that the statute was enacted with awareness of a pre-existing private remedial scheme for its enforcement. Respondents readily admit that penal liability for double damages could never be "implied" in this same manner from congressional silence, and that Congress would never intend enforcement of such an extraordinary remedy without its express mandate. The fact that Congress would feel compelled to "do so" when it wished to create such an unusual remedy, however, bespeaks nothing about the significance to be attributed to its silence with regard to a well-recognized pre-existing system of equitable and common-law remedies. Or rather, if anything, it supports the proposition that such silence cannot be read as an abrogation of such an existing system, because it shows that Congress will affirmatively "do so" wherever and whenever it wishes to make any unusual change in the existing legal system, whether that change amounts to creation of an extraordinary penal sanction or to abrogation of recognized private remedial rights.

Secondly, in any event, even if this statute did create a civil damage remedy of the ordinary kind, the attribution of controlling significance to that fact in the present context would be improper. This Court recently cautioned against the dangers of precisely this sort of speculative extrapolation of congressional intent. Like the federal respondents here, the respondents in Cannon v. University of Chicago, supra, sought to derive a negative implication regarding private enforcement from the express mention of private remedies in other sections of the legislation at issue there. The Court rejected this argument in the following passage (441 U.S. at 711):

> The fact that other provisions of a complex statutory scheme create express remedies has not been accepted as a sufficient reason for refusing to imply an otherwise appropriate remedy under a separate section. See, e.g., J. I. Case Co. v. Borak, supra; Wyandotte Transportation Co. v. United States, supra. Rather the Court has generally avoided this type of "excursion into extrapolation of legislative intent," Cort v. Ash, supra, 422 U.S., at 82 n. 14, unless there is other more convincing evidence that Congress meant to exclude the remedy. See National Railroad Passenger Corp. v. National Assn. of Railroad Passengers, supra, 414 U.S. at 458-61.

In the end, then, far from sustaining their burden of an affirmative showing that Congress intended to displace the recognized system of private relief for obstructions to navigation, the federal respondents and water agencies have been able to point only to occurrences in the legislative history which are meaning-

less at best and in the end seem to provide less support for these parties' position than for that of respondents. The legislative history thus remains a silence - a silence that is eloquent with clear indications that Congress chose to say nothing about private rights only because to do otherwise would have been to belabor the obvious.

C. From Shortly After Its Enactment Down to the Present Day, the Act Has Been Frequently and Consistently Interpreted by the Federal Courts as Allowing Private Enforcement of Section 10, and Congress's Failure to Take Action to Change This Interpretation Is a Further Indication of Its Intention to Permit Such Enforcement.

In deciding whether the jurisidictional grant of section 12 of the Rivers and Harbors Act should be interpreted as authorizing private relief against violation of the substantive prohibitions of section 10, this Court is not writing on a clean slate. Commencing only two years after enactment of the statute, the federal courts have addressed this question on numerous occasions. With extremely few exceptions, all of these cases have held that violations of the statute can be redressed in a private action. These decisions, particularly those rendered nearly contemporaneously with the enactment of the statute, must naturally be accorded a certain amount of authoritative significance by this Court. Beyond this, however, the existence of this consistent line of authority, together with Congress's failure to take action to change the rule

there enunciated must be taken as a further sign that Congress itself contemplated private enforcement of the Act. Cannon v. University of Chicago, supra at 702-3.

The first reported decision to address the issue of private enforcement was E.A. Chatfield Co. v. City of New Haven, 110 Fed. 788 (D.Conn. 1901), in which a merchant shipper sought to enjoin, under the 1899 Act, the construction of a bridge by the City of New Haven without the permission of the Secretary of War required by section 10 of the Act. In overruling a demurrer which, among other defenses, raised a challenge to the right of a private party to enforce that section, the court held (110 Fed. at 793-94; citations omitted):

> Jurisdiction has always existed in the circuit court to have cognizance of suits of a civil nature between individuals which arise out of the laws of the United States when the matter in dispute exceeds a specified sum, and, if a cause of action has thus arisen, no further or more specific authority is requisite.
>
> It has not been questioned that if congress had authorized the construction of a bridge over navigable waters, in accordance with plans approved by the secretary of war, or by a named board of engineers, and the bridge should be constructed in such defiance of the approved plans as to obstruct navigation, that a bill in equity in behalf of an individual specially injured by such obstruction against the corporations which are constructing the bridge could be sustained in the circuit court upon the ground that the structure is in violation of the laws of the United States. The bill in this case is based upon the ground that after the construction of the bridge without the authority of the

United States it was found, in pursuance of an act of congress, to be an unreasonable impediment to navigation, and that the hindrance had not been removed.

It is next said that the bill does not show that the complainants had suffered a damage special and peculiar to themselves, and that the inconvenience was of a character which was common to the public generally, and that, therefore, the bill did not show a case sufficient for their individual relief. It is true that "relief will not be granted unless it appears that the party complaining will sustain a special or peculiar damage, - an injury distinct from that done to the public at large." And it is also true that the courts of Connecticut have required that the special injury should clearly appear, but the special injury to the Chatfield company, at least, is sufficiently averred in the bill.

The next in the succession of early decisions on this issue was that of the circuit court in Lownsdale v. Gray's Harbor Boom Co., 117 Fed. 983 (W.D. Wash. 1902). In that case, the court refused relief against an allegedly obstructive logging boom on the narrow ground that a court of equity could not enforce the asserted rights of a riparian landowner where the question of title to his land was in dispute and accordingly required prior settlement in a court of law. Nevertheless, the court affirmed in dicta the general availability of private relief against such an obstruction in the following passage [117 Fed. at 987]:

> Passing now to consideration of the proposed injunction against the alleged obstruction to navigation: If the boom is an obstruction not authorized by law, it is a public nuisance, which may be abated by proper proceedings instituted

in behalf of the state or the United States government. It is essential to the maintenance of the suit by any individual to abate a public nuisance for the complainant to show that he is peculiarly affected and especially injured by it. In this case the complainants do not claim to be peculiarly affected or specially injured by the obstruction of navigation, except as owners of the land described in their complaint. They aver that the boom and the logs which it holds constitute a barrier to free ingress and egress to and from the land. Their right, therefore, to complain of the obstruction of navigation and travel upon the river and slough, depends upon their ownership of the land, which is disputed, and until their title to the land shall have been established they cannot prove any special injury.

The final decision on this issue rendered during the Act's first decade was Carver v. San Pedro L.A. & S.L.R. Co., 151 Fed.334 (S.D. Cal. 1906). In that case, the court granted an injunction against an obstructing bridge constructed without an appropriate permit, relying upon the Act as the basis for its substantive ruling but turning to the pre-existing law of private remedies for nuisance as the sole ground for its remedial decision, precisely as Congress undoubtedly intended the courts to do. Thus, the court disposed of the remedial issue in the following passage, which is as significant for its citations as for its content (151 Fed. at 335):

> It is firmly established by a long line of federal decisions that an obstruction to navigable water may be enjoined by a private person who is injured thereby differently from the general public, either in degree or kind. Georgetown v. Alexander Co., 12 Pet. 98, 9 L.Ed. 1012;

Pennsylvania v. Wheeling, etc., Bridge Co., 13 How. 564, 14 L. Ed. 249; Union Pacific Railroad Co. v. Hall, 91 U.S. 343, 355, 23 L. Ed. 428; Baird v. Shore Line Ry. Co., 2 Fed. Cas. 427 (No. 758); Works v. Junction R.R., 30 Fed. Cas. 626 (No. 18,046); Hatch v. Wallamet Iron Bridge Co. (C.C.) 6 Fed. 326; Id. (C.C.) 6 Fed. 780. This last case was reversed by the Supreme Court, but the reversal was on jurisdictional grounds, not affecting the point now under consideration. Willamette Iron Bridge Co. v. Hatch, 125 U.S. 2, 8 Sup. Ct. 811, 31 L. Ed. 629.

The judges who rendered these three earliest decisions shared the general perceptions, linguistic usages and legal backgrounds of the legislators who enacted the statute. Since this perspective is difficult for us to recreate, these holdings should be given a special deference even by this Court. See Cannon v. University of Chicago, supra at 706 n.40.

At any rate, there followed, during the next seventy-five years, an almost unbroken string of dozens of decisions in which the lower federal courts either squarely held that a private remedy was available for violation of the Act or clearly indicated in dicta that the remedy would have been granted but for one or another circumstance, other than absence of a "private right of action," that happened to disqualify the plaintiff from obtaining relief on the merits in the particular case. Cited in chronological order, these decisions are: Silvey v. Commissioners of Montgomery County 273 Fed.202, 204 (S.D. Ohio 1921); Neches Canal Co. v. Miller & Vidor Lumber Co., 24 F.2d 763, 765 (5th

Cir. 1928); City of Memphis v. Ingram, 98 F.Supp. 395, 397-99 (E.D. Ark. 1951), revd. on other grounds 195 F.2d 338 (8th Cir. 1952); Tatum v. Blackstock, 319 F.2d 397, 399-400 (5th Cir. 1963); Puente de Reynosa, S.A. v. City of McAllen, 357 F.2d 43, 47 (5th Cir. 1966); Norfolk Dredging Co. v. Radcliff Materials, Inc., 264 F.Supp. 399, 403 (E.D. Va. 1967); Lauritzen v. Chesapeake Bay Bridge & Tunnel Dist., 259 F.Supp. 633, 638 (E.D. Va. 1966), affd. 404 F.2d 1001 (4th Cir. 1968); Citizens Committee for the Hudson Valley v. Volpe, 302 F.Supp. 1083, 1087 (S.D.N.Y. 1969), affd. 425 F.2d 97 (2d Cir. 1970); Alameda Conservation Assn. v. State of California, 437 F.2d 1087 (9th Cir. 1971); Lavagnino v. Porto-Mix Concrete, Inc. 330 F.Supp. 323, 325 (D. Colo. 1971); Monroe County Conservation Council v. Volpe, 472 F.2d 693, 702-3 (2d Cir. 1972); Hawkinson v. Blandin Paper Co., 54 F.R.D. 517, 518-19 (D. Minn. 1972); Sierra Club v. Leslie Salt Co., 354 F.Supp. 1099, 1103-4 (N.D. Cal. 1972); James River & Kanawha Canal Parks, Inc. v. Richmond Metropolitan Auth., 359 F.Supp. 611, 638-39 (E.D. Va. 1973), affd. 481 F.2d 1280 (4th Cir. 1973); Burgess v. M/V Tamano, 370 F.Supp. 247, 250 (D. Me. 1973); State of Florida v. Charley Toppino & Son, Inc., 514 F.2d 700, 702 n.4 (5th Cir. 1975); Potomac River Assn. v. Lundeberg Md. Sea School, Inc., 402 F.Supp. 344, 356-58 (D. Md. 1975); People of State of Ill. ex. rel. Scott v. Hoffman, 425 F.Supp. 71, 75-76 (N.D. Ill. 1977); Libby Rod & Gun Club v. Poteat, 594 F.2d 742, 748 (9th Cir. 1979); Sierra Club v. Andrus,

610 F.2d 581, 592 (9th Cir. 1979), cert. granted, ___ U.S. ___, 101 S.Ct. 68 (1980); Norfolk & Western Co. v. Dunbar & Sullivan Dredging Co., __ F.2d ___ (6th Cir., decided October 21, 1980). See also National Sea Clammers Assn. v. City of New York, 616 F.2d 1222, 1232 n.30 (3d Cir. 1980), cert. granted ___ U.S. ___, 49 USLW 3289 (1980); Riggle v. State of California, 577 F.2d 579, 582-83 (9th Cir. 1978); Radford Iron Co. v. Appalachian Elec. Power Co., 62 F.2d 940, 942-43 (4th Cir. 1933); Bellaire, Benwood & Wheeling Ferry Co. v. Interstate Bridge Co., 40 F.2d 323, 325-27 (4th Cir. 1930); Parsell v. Shell Oil Co., 421 F.Supp. 1275, 1277 (D. Conn. 1976), affd. per curiam 573 F.2d 1289 (2d Cir. 1977); Natural Resources Defense Council v. Grant, 355 F.Supp. 280, 290 (E.D.N.C. 1973). The only isolated departures from this otherwise unanimous view during this entire period have consisted of: (1) two very recent decisions, from the same district court, to the effect that the Attorney General's authority to enforce section 10 is exclusive (Citizens Comm. for Environmental Protection v. United States Coast Guard, 456 F.Supp. 101, 112 (D.N.J. 1978); Loveladies Property Owners Assn. v. Raab, 430 F.Supp. 276, 281 (D.N.J. 1975), affd. per curiam 547 F.2d 1162 (3d Cir. 1976)); (2) a handful of instances of overly broad dicta to the same general effect in cases that actually involved very different issues, such as the availability of private relief under other sections of the Act permitting exclusively criminal enforcement or an alleged

waiver of a state's sovereign immunity from damage suits (City of Evansville v. Kentucky Liquid Recycling Inc., 604 F.2d 1008, 1011-12 (7th Cir. 1979); Red Star Towing & Transp. Co. v. Department of Transp. of New Jersey, 423 F.2d 104, 105-6 (3d Cir. 1970); Barcelo v. Brown, 478 F.Supp. 646, 670-71 (D.P.R. 1979); Hooper v. United States 331 F.Supp. 1056, 1058 (D.Conn. 1971); State of South Carolina v. South Carolina Elec. & Gas Co., 41 F.Supp. 111, 118-19 (E.D.S.C. 1941)*); and

* The other parties to this proceeding have from time to time cited these decisions, as well as other decisions on these distinct issues which do not even include the type of broad dicta referred to, as a basis for representing to this Court that there is a serious "conflict" among the lower federal courts on the issue presented here. It is therefore worthwhile to point out why the issue involved here is indeed very different from the issues presented in these cases. The difference between the category of cases involving a qui tam complaint by a member of the general public seeking to enforce the criminal penalties of the Rivers and Harbors Act and the type of civil action by an injured party being prosecuted here is obvious on its face, as the court below was careful to take note. Pet. App. 21. See also Connecticut Action Now, Inc. v. Roberts Plating Co., 457 F.2d 81, 83-85 (2d Cir. 1972); Sierra Club v. Leslie Salt Co., supra at 1104 n.2. Also clearly distinguishable, as the court below and several other lower courts have further observed, are those cases which have reached divergent results on the private enforceability of the so-called "Refuse Act" (33 U.S.C. §407), a separate section of the Rivers and Harbors Act which provides no civil remedy whatsoever and relies solely on the Act's criminal penalties for its enforcement. Pet. App. 21. See National Sea Clammers Assn. v. City of New York, supra at 1232 n.30; Parsell v. Shell Oil Co., supra at 1277. Compare Natural Resources Defense Council v. Grant, supra. (contd.)

(3) two cases in which the courts expressed doubt regarding the availability of private relief, but declined to resolve the issue on the ground that, in any event, the party before them had not alleged the type of particular injury that would sustain such a claim (Connecticut Action Now, Inc. v. Roberts Plating Co., supra at 89; Carolina Power & Light Co. v. South Carolina Public Service Auth., 94 F.2d 520, 524 (4th Cir. 1938)).*

(footnote contd.) Finally, this Court itself has acknowledged that cases presenting the question whether a state has intentionally waived its sovereign immunity from private damage actions by entering upon a federally regulated activity, which requires a determination whether Congress has authorized private actions against the state "by the most express language or by such overwhelming implications from the text as [will] leave no room for any other reasonable construction," present an issue very different from the mere implication of a private right of action in suits for injunctive relief of the kind presented here. Edelman v. Jordan, 415 U.S. 662, 673-74 (1974), quoting Murray v. Wilson Distilling Co., 213 U.S. 151 (1909). Accord, Riggle v. State of California, supra at 583; Intracoastal Transp., Inc. v. Decatur County, 482 F.2d 361, 365-66 (5th Cir. 1973). Compare Lauritzen v. Chesapeake Bay Bridge & Tunnel Dist., supra.

* Concurrently with the development of the nearly unanimous view that the Act confers a private remedy enforceable on the "law side" of the federal court under 28 U.S.C. §1331, an even more numerous group of admiralty decisions were construing the Act as establishing a basis for negligence claims under 28 U.S.C. §1333 on behalf of private parties injured in collisions with obstructive bridges and by other violations of the Act. E.g., Complaint of Tug Helen B. Moran, 560 F.2d 527, 528 (2d Cir. 1977); (contd.)

During the same period, several decisions of this Court similarly indicated, albeit without addressing the issue with complete explicitness, that a private cause of action would lie for violation of section 10. Only four years after enactment of the statute, for example, the Court upheld the right of a private party to maintain what might be called a 'reverse-section-10-action,' sustaining an injunction against local governmental interference with a private project authorized by a Corps of Engineers permit. Cummings v. Chicago, 188

(footnote contd.) Complaint of Wasson, 495 F.2d 571, 579-80 (7th Cir. 1974); Acme Boat Rentals, Inc. v. J. Ray McDermott & Co., 424 F.2d 393, 395 (5th Cir. 1970); Morania Barge No. 140 v. M. & J. Tracy, Inc., 312 F.2d 78, 80 (2d Cir. 1962); The Fort Fetterman v. South Carolina Highway Dept., 261 F.2d 563, 565, 567 (4th Cir. 1958); F.S. Royster Guano Co. v. Outten, 266 Fed. 484, 486 (4th Cir. 1920); Board of Cmrs. of Port of New Orleans v. M/V Agelos Michael, 390 F.Supp. 1012, 1015 (E.D. La. 1974); Dow Chem. Co. v. Dixie Carriers, Inc., 330 F.Supp. 1304, 1307 (S.D. Tex. 1971), affd. 463 F.2d 120 (5th Cir. 1972); American Zinc Co. v. Foster, 313 F.Supp. 671, 680-81 (S.D. Miss. 1970); Reading Co. v. Pope & Talbot, Inc,, 192 F.Supp. 663, 667 (E.D.Pa. 1961), affd. per curiam 295 F.2d 40 (3d Cir. 1961); Gulf Atl. Transp. Co. v. Becker Sand & Gravel Co., 122 F.Supp. 13, 17 (E.D.N.C. 1954); United States v. Norfolk-Berkeley Bridge Corp. 29 F.2d 115, 124-25 (E.D. Pa. 1928). While many of these cases can perhaps be distinguished on the ground that they merely viewed the Act as providing a standard of conduct for adjudicating claims that ultimately rested on some other jurisdictional base, others among them cannot be read so narrowly. In Gulf Atl. Transp. Co. v. Becker Sand & Gravel Co., supra, for example, the court said (122 F.Supp. at 17-18; citations omitted): (contd.)

U.S. 410 (1903). In another case arising in the same decade, the Court dismissed a writ of error in a private action directly based on section 10 on the basis of an adequate state ground for the judgment below, extensively discussing the issues in the case without ever intimating that the underlying cause of action might not be sustainable because of the unavailability of a "private right of action" to enforce the Act. North Shore Boom & Driving Co. v. Nicomen Boom Co., 212 U.S. 406 (1909). Most

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(footnote contd.)

> Congress has specifically prohibited the creation of any obstruction, not affirmatively authorized, to the navigable capacity of any United States waters, 33 U.S.C.A. §403; . . . Any person who sustains a special injury by an unlawful obstruction of or deposit in navigable waters may maintain an action for the resulting damages.
>
> . . .
>
> It is not necessary for libelant to prove that respondent was negligent in the way it operated its gravel washing plant. Whether the theory of the action be negligence or nuisance a showing that respondent unlawfully obstructed a navigable stream entitles libelant to recover any damages proximately caused it by such obstruction . . .

Even those decisions that are more clearly confined to the standard-of-conduct rationale can be read as some authority for a private right of action on the law side of the court insofar as the role played by the Act in these admiralty cases is not really very different from the role Congress apparently contemplated it would play in legal and equitable cases. As shown above, the principal thrust of the Act as a whole was simply to furnish substantive prohibitions which Congress assumed would automatically become privately enforceable by virtue of the entire panoply of pre-existing legal, equitable and admiralty remedies.

significantly, in Wisconsin v. Illinois, 278 U.S. 367 (1929), a decision relied upon by the court below as a sub silentio approval of private enforceability, the Court sustained a claim by a party other than the Attorney General - namely, a state - for which the only legal basis recited in the opinion was "that the withdrawals [of water from Lake Michigan] were in palpable violation of the Act of Congress of March 3, 1899 [the Rivers and Harbors Act]." 278 U.S. at 400.* Fourthly, in Wyandotte Transp. Co. v. United States, 389 U.S. 191 (1967), the Court, besides generally advocating a "broad" construction of the remedial provisions of the Act, expressly held that the remedies specified therein "were not intended to be exclusive," and on that basis authorized a proprietary action by the United States to recover its expenses sustained in removing a sunken ship that was obstructing a navigable waterway. 389 U.S. at 200-1. Finally, in Cort v. Ash, supra at 79, the Court cited Wyandotte, supra, among other cases, as representing an instance of "implication of a private cause of action."

* The other parties have striven mightily to distinguish this decision, claiming that the plaintiff's reliance on the Rivers and Harbors Act was only an alternative basis for its complaint and that the judgment in its favor actually rested on other grounds (e.g., Brief for Water Agencies, pages 25-26). They have been unable to point to any other such basis or ground, however, beyond a single phrase in the opinion referring to damage inflicted upon "riparian and other rights of the complainant" (278 U.S. at 410), which hardly constitutes a statement of a specific alternative legal basis for either the complaint or the judgment.

It is true that the Court very recently seemed to retreat from this last arguable overstatement by reclassifying the Wyandotte decision among those decisions that have "implied causes of action in favor of the United States where the statute creates a duty in favor of the public at large." Cannon v. University of Chicago, supra at 691 n.13. It is also true, of course, that the Court's grant of certiorari on this issue in this case indicates that it does not view the issue of private enforceability as having been definitively resolved. Nevertheless, a perceptive review of this entire series of encounters with this issue in the opinions of this Court would necessarily convey the distinct impression that the Court has harbored some inclination, at the very least, to concur in the nearly unanimous view of the lower courts that a private remedy is available for violations of the Rivers and Harbors Act.

All of these decisions, particularly the decisions of this Court and the earliest decisions of the lower federal courts, are of course entitled to be treated as authoritative precedents in the context of the Court's present effort to reach a resolution of this issue in this case. See Cannon v. University of Chicago, supra at 706 n.40. Perhaps more importantly, however, they have also constituted a clear signal to the Congress that the prevailing judicial interpretation of the Act has permitted its enforcement by private parties. The fact that Congress took no action to correct that

interpretation during the entire 80-year history of this line of authority is further persuasive evidence that Congress has shared the courts' view that the Act should be enforced in this manner. The importance of this consideration was recently stressed by this Court in Cannon v. University of Chicago, supra, in a passage of that opinion which, with appropriate substitutions of dates and titles, would seem directly applicable to this case (441 U.S. at 702-3):

> Finally, the very persistence - before 1972 and since, among judges and executive officials, as well as among litigants and their counsel, and even implicit in decisions of this Court - of the assumption that both Title VI and Title IX created a private right of action for the victims of illegal discrimination and the absence of legislative action to change that assumption provide further evidence that Congress at least acquiesces in, and apparently affirms that assumption.

The decisions reviewed herein thus provide a final decisive reinforcement, not only by way of stare decisis but as a further indication of congressional intent, for the conclusion that a private remedy exists for violation of section 10 of the Rivers and Harbors Act.

D. The Other Factors Deemed Relevant to Implication of a Private Remedy Favor Its Implication in This Case.

This Court has recently indicated that, in cases of this kind, "our task is limited solely to determining whether Congress intended to create [a] private right of action," and that the inquiry "ends there" once the legislative intent in this regard has been ascertained.

Touche, Ross & Co. v. Redington, supra at 568, 576. Accord, Transamerica Mortgage Advisers Assn. v. Lewis, supra at 15-16, 23-24. Since it has already been demonstrated that Congress contemplated private enforcement when it enacted the Rivers and Harbors Act, respondents might safely conclude their discussion of this issue at this point. Nevertheless, since the Court has also intimated in these recent decisions that the additional "factors" originally identified as "relevant" to the resolution of this issue in Cort v. Ash, supra, might still be given some weight, at least as further aids to determining legislative intent, and because the Solicitor General has taken the position in his brief that "ill effects on the administration of section 10" by the Corps of Engineers would result from acknowledgment of Congress's intention to afford a private remedy, respondents are compelled to undertake a brief discussion of the application of these additional considerations to the circumstances of this case (Brief for Federal Respondents, page 23 n.15). Touche, Ross, supra at 575-76; TAMA, supra at 23-24. See also, Cannon, supra at 688 ("a court must carefully analyze the four factors that Cort identifies").

1. Benefit to a Particular Class

Besides ascertainment of Congress's intent from the legislative history, the first additional "factor" mentioned in Cort v. Ash, supra, is whether the statute confers a benefit on a particular class of individuals as opposed to the public at large. Cort v. Ash, supra

at 78-79. As regards this case, this question has already been affirmatively answered by the earlier recital of the common-law background of the Rivers and Harbors Act. It was there shown that only those persons who could demonstrate a "particular injury" to themselves by reason of an obstruction to navigation - and not the public at large - could invoke the particular equitable remedies which Congress took into account when it enacted the Rivers and Harbors Act. Gilman v. Philadelphia, supra at 604-5. It was also shown that the Act was passed for the specific purpose of overruling a line of decisions in which private parties who had suffered such particular injuries had been unable to obtain relief because of an existing inadequacy in substantive federal law. 21 Cong. Rec. 8605. This restriction on the availability of relief to persons actually injured by the challenged obstructions has been carefully preserved in the subsequent line of decisions in the lower courts affording relief to private parties under the Act. Tatum v. Blackstock, supra at 399; Carolina Power & Light Co. v. South Carolina Public Service Auth., supra at 524; Radford Iron Co. v. Appalachian Elec. Power Co., supra at 251-52; James River & Kanawha Canal Parks, Inc. v. Richmond Metropolitan Auth., supra at 638-39; Lavagnino v. Porto-Mix Concrete, Inc., supra at 325-26; Norfolk Dredging Co. v. Radcliff Materials, Inc., supra at 403; City of Memphis v. Ingram, supra at 398-99;

Carver v. San Pedro L.A. & S.L.R Co., supra at 335; Lownsdale v. Gray's Harbor Boom Co., supra at 987; E.A. Chatfield Co. v. City of New Haven, supra at 794. Accordingly, it is clear that a particular class of individuals has been singled out to receive the benefits granted by the Act, and that this first additional "factor" therefore favors effectuation of the congressional purpose to preserve the private remedy.

2. Consistency with the Legislative Purpose (Herein of the Alleged "Ill Effects" of Private Enforcement)

The next additional factor listed in Cort is whether the recognition of a private remedy would effectuate or frustrate "the underlying purpose of the legislative scheme." Cort v. Ash, supra at 78. Accord, Cannon v. University of Chicago, supra at 703. This question may seem somewhat anachronistic in this context because it seems to assume a typical modern situation in which the "underlying purpose" of the statute is the creation of some wider regulatory program to which private rights of action would be a mere adjunct, whereas this statute was enacted with a full awareness that the normal enforcement method against obstructions to navigation had been private injunctive actions and the enforcement authority of the Attorney General was itself envisioned as a mere adjunct to these private efforts which would be brought into play when it was necessary to confront some of the more resourceful and affluent violators with "a power that

they respect." 21 Cong. Rec. 8603. Nevertheless, since the federal government concededly now conducts an extensive enforcement program which neither respondents nor the Court would wish to see undermined, and since the government has claimed that private enforcement would have certain "ill effects" on that program, the issue of the compatibility of private remedies with the public regulatory scheme must be briefly addressed.

The short answer to the Solicitor General's argument is of course that the Corps of Engineers must simply be required to suffer any "ill effects" that might arise from private enforcement of section 10 because Congress clearly contemplated - indeed, desired - that such enforcement should take place. See Cannon, supra at 706-7 n.41. An almost equally obvious answer to the argument is that the Corps' enforcement program has apparently managed to survive and thrive despite the supposed "ill effects" of private actions during the preceding 80 years in which the lower federal courts have consistently and frequently entertained such actions. See cases cited at pages 48-53, supra. However, because of the substantial deference which the Court has accorded to the government's views on this type of issue in past cases (see Cannon, supra, at 687-88 n.8, 706-8; SIPC v. Barbour, supra at 414; Allen v. Board of Elections, supra at 557 n.23), respondents will eschew these easy answers and go on to demonstrate, first, that the government's fears are in fact entirely imaginary and, second, that consequences far more

undesirable than any conceivable "ill effects" of private enforcement will follow if the long-recognized private remedy for violations of the Rivers and Harbors Act should now be expunged by this Court.

The plaintiffs in this case have sought and obtained from the courts below a very limited form of relief, consisting of an injunction that would abate the challenged water diversions pending an application for a Corps permit and a determination by the Corps whether these diversions should be prevented or limited. Plaintiffs are not here seeking to have the courts dictate the outcome of that determination or even the manner in which the Corps should go about making it. They seek only to compel the initiation of the administrative process. Given the limited scope of this requested relief, it is difficult to conceive what "ill effects" might actually arise from permitting the action to be entertained.

In past cases, the typical difficulty which has led the Court to find that private relief would be undesirable has been potential inconsistencies between administrative determinations of the legality of regulated activities and privately initiated judicial determinations of that same issue. E.g., SIPC v. Barbour, supra at 422-23; National R.R. Pass. Corp. v. National Assn. of R.R. Passengers, supra at 463. As the Court expressly recognized in Allen v. Board of Elections, supra at 555 n.19, this type of problem simply does not arise where "the only question is whether [the challenged conduct]

must be submitted for approval." Accord, Potomac River Assn. v. Lundeberg Md. Sea School, Inc., supra at 356; James River & Kanawha Canal Parks, Inc. v. Richmond Metropolitan Auth., supra at 639. In cases presenting this limited issue, the only imaginable legitimate concern of the enforcement authorities would be the threat that private actions might force them to dissipate their resources in reviewing large numbers of trivial or obviously uncensurable activities. Any such threat can easily be forestalled, however, by the simple expedient of incorporating into the administrative process summary procedures for disposing of such unmeritorious complaints. Indeed, the Corps of Engineers itself appears to have already anticipated and resolved this very sort of problem by means of its "general permit" program. 33 C.F.R. §322.5(b). The "ill effects" of this limited type of private enforcement are thus seen to be either entirely illusory or easily manageable. The Solicitor General has offered nothing in his brief which would refute or qualify this conclusion.

Turning now to the potential adverse consequences of not permitting private enforcement of the Act, these are seen to be of two kinds, both of which are substantial. First, exclusive public enforcement would fail to achieve the congressional goal of vigorous protection of the nation's navigable waterways because, with respect to many of the activities most harmful to navigation, the public enforcement authorites are the proverbial "fox in the chicken coop." While the rail-

roads may have been the principal original target of the 1890 legislation, probably the most prominent potential violator of the Act today is, as this case illustrates, the federal Water and Power Resources Service.* Although this Court has long since held that the proscriptions and permit requirements of the Rivers and Harbors Act apply with their full vigor to the activities of this agency (United States v. Arizona, 295 U.S. 174, 184 (1935)), actual enforcement of its obligations in this regard obviously involves the Attorney General and the Corps of Engineers in a certain conflict of loyalties. In this type of circumstance, as the court below and other federal courts have previously recognized, private enforcement might well afford the only means of fully effectuating the congressional objectives underlying the enactment. Pet. App. 19; People of State of Illinois ex rel. Scott v. Hoffman, supra at 76; Miller v. Mallery, 410 F.Supp. 1283, 1289 (D.Ore. 1976); Natural Resources Defense Council v. Grant, supra at 290. The preclusion of such enforcement would accordingly risk substantial frus-

* As the court knows, one of the diversion facilities challenged by plaintiffs and found unlawful by the district court in this case was the Tracy Pumping Plant of the federal government's Central Valley Project (Pet. App. 88-90, 101-3). The court of appeals' dismissal of this claim, on the basis that Congress had implicitly exempted the plant from the Rivers and Harbors Act in the course of appropriating the funds for its construction (Pet. App. 40-49), is the subject of a separate review petition now pending in this Court. Sierra Club v. Andrus, No. 79-1625 (filed April 15, 1980).

tration of "the underlying purpose of the legislative scheme." Cort v. Ash, supra at 78. See Cannon v. University of Chicago, supra at 706-7.

A second adverse consequence of foreclosing private relief under the Rivers and Harbors Act would be to relegate protection of the country's navigable waterways to the vagaries of state nuisance laws. In those cases where, as here, the federal authorities have abdicated their responsibility to require administrative review of potentially obstructive activities, a nuisance action in a state court would be the only alternative relief available to an injured party in the event he were to be denied the right to compel such review by means of a private action under the Rivers and Harbors Act.* State nuisance laws being in a notorious state

* It is possible that a nuisance action could be prosecuted in a federal court under the federal common law of nuisance which the federal judiciary was authorized to develop by the decision of this Court in Illinois v. City of Milwaukee, 406 U.S. 91 (1972). However, there still appears to be some uncertainty whether that holding will ultimately be interpreted to authorize claims by private parties. See National Sea Clammers Assn. v. City of New York, supra at 1234; City of Evansville v. Kentucky Liquid Recycling, supra at 1018; Parsell v. Shell Oil Co., supra at 1280-81; Note, Federal Common Law and Interstate Pollution, 85 Harv. L.Rev. 1439 (1972). In any event, the "ill effects" on the government's administrative enforcement program, by way of potential inconsistent judicial determinations, of even federal nuisance actions would surely be greater than those that would arise from merely permitting private enforcement of the obligation to submit a challenged activity to Corps of Engineers review, which is the only relief sought here.

of confusion and conflict (see Prosser, Torts 571 (4th ed. 1971)), it would be hard to imagine an outcome more productive of "ill effects" upon the system of uniform federal regulation of navigation rights contemplated by Congress when it passed the Act. Only recently, in sustaining a private right of action in Transamerica Mortgage Advisers Assn. v. Lewis, supra, this Court stated that it would be an "anomalous construction" of a federal statute which, by denying a private federal remedy, would relegate enforcement of private rights in an important area of federal regulation to litigation in the state courts, let alone to litigation conducted, as it would be here, according to the vagaries and disparities of state substantive law. Id., 444 U.S. at 19.n8. This disturbing prospect thus provides, not only a final compelling reason why preclusion of private relief under the Rivers and Harbors Act would frustrate "the underlying purpose of the legislative scheme," but further reinforcement, if any were needed, of the earlier conclusion that such a result could not have been contemplated by Congress.

3. Relegation to State Law

The last of the Cort v. Ash "factors" is the question whether the subject matter of the action lies "in an area traditionally relegated to state law." Cort v. Ash, supra at 78. The intervening water agencies have argued in their brief that this question must be answered in the affirmative because plaintiffs are here seeking to prevent "the appropriation of waters within

California's borders . . . and . . . control of that activity has been traditionally relegated to the State" (Brief for Water Agencies, page 27).

This is a brazen mischaracterization of the nature of this action. Plaintiffs are not disgruntled water consumers seeking some different allocation of water appropriations but users of interstate navigable streams seeking to prevent the destruction of their capacity to support navigation; and the Rivers and Harbors Act of 1899 is not some regulation of competing appropriative water rights but the very cornerstone of the federal statutory framework for protection of the nation's system of navigable waterways from private and state interference and obstruction. See United States v. Republic Steel Corp., supra at 492-93. With the possible exceptions of national defense and foreign affairs, there is no area which, throughout the nation's history, has been more completely committed to federal control or of which the rubric "traditionally relegated to state law" would be less descriptive than that of regulation of interstate navigation. Kaiser Aetna v. United States, 444 U.S. 164, 173 (1979); Illinois v. City of Milwaukee, supra at 101; United States v. Appalachian Power Co., 311 U.S. 377, 426-27 (1940); Gilman v. Philadelphia, supra at 724-25; Gibbons v. Ogden, supra at 188-92.

E. Conclusion

Every relevant consideration thus supports the recognition of a private remedy for violations of

section 10 of the Rivers and Harbors Act of 1899. While the pertinent language of the Act is not explicit, it suggests the existence of a private remedy by granting unrestricted jurisdiction to the district courts of cases arising under the Act and by omitting any suggestion that public enforcement of the Act is intended to be exclusive. The common law background of the legislation reveals universal recognition of a private right to enjoin obstructions to navigation of the type prohibited by the Act, and the legislative history contains no indication that this established private right was intended to be abrogated by the authorization of supplementary public enforcement. The 80-year history of judicial interpretation of the statute reflects a consistent view that section 10 is privately enforceable, and the absence of congressional action to correct that view is further evidence that private enforcement accords with the intent of Congress. Finally, all of the other "factors" heretofore deemed "relevant" to implication of a private right of action, particularly the clear consistency of private enforcement with the "underlying purpose of the legislative scheme," militate in favor of such implication in this case. The court of appeals' holding on this issue should therefore be affirmed.

II. The State's Diversion of Water from the Delta Without a Corps of Engineers Permit Is a Clear Violation of Section 10 of the Act.

A. Introduction

The foregoing discussion of the first major question

presented by this case - whether there exists a private right to enforce the Rivers and Harbors Act of 1899 - has perforce been lengthy and thorough. This exhaustive treatment has been necessitated primarily by the fact that these respondents alone have been required to bear the burden of demonstrating an affirmative answer to this question, the federal respondents having taken an opposing position on the issue. In addition, respondents were unable to relieve themselves of this burden to any significant extent by reliance on the court of appeals' opinion, since certain intervening decisions of this Court had rendered many aspects of that opinion arguably obsolete with respect to its treatment of this issue. Respondents do not suffer from these same handicaps in dealing with the second of the two major issues presented here - namely, whether the challenged water diversions are in violation of the substantive prohibitions of section 10 of the Act. The court of appeals' opinion on this issue sets forth a painstaking and thoughtful analysis of the question to which little can or need be added. In addition, the federal respondents have sided with these respondents on this latter issue, and have previously submitted to the Court in their brief a thorough refutation, with which these respondents are in full accord, of each of the several arguments for rejecting the conclusions of the court of appeals that have been offered by the State and the intervening water agencies. Accordingly, these respondents will not burden the Court with yet another comprehensive

treatment of all of the numerous reasons and authorities which demonstrate the lack of merit in those arguments. Instead, they will rest content with a partial treatment in which they will emphasize only those few discrete points or authoritative sources which, for one reason or another, may not have received due emphasis in either the government's brief or the opinion of the court below.

B. The Legislative History, the Applicable Precedents and Every Consideration of Practicality Require Rejection of the Argument That a District Court Must First Find an Unreasonable Obstruction to Navigable Capacity Before the Corps of Engineers May Assume Jurisdiction to Examine That Same Issue, an Argument Which Is Futile in This Case in Any Event Because the District Court Did in Fact, Albeit Gratuitously, Make Precisely Such a Finding.

The first argument of the State and the intervenors is that section 10 of the Act must be construed to require a judicial finding of an unreasonable obstruction to navigation within the meaning of that section's first clause before any of the activities enumerated in the second and third clauses need be submitted to the Corps of Engineers for its determination of whether such an obstruction has occurred. The following two consecutive paragraphs from the brief of amici curiae States of Arizona et al. (at page 8) best epitomizes both the content and the fundamental flaw of these parties' argument on this question:

> From these cases, it should be clear that unless the structure or work would create some kind of obstruction to navigation or navigable capacity, the Army Corps of Engineers has no authority under Section 10 to require a permit.
>
> The Corps of Engineers has traditionally administered Section 10 consistently with this premise, so that the primary consideration in determining whether a permit should be issued has been whether the proposed structure or activity would adversely affect navigable capacity.

As stated in the second of these paragraphs, it is conceded by these parties that the issue which has been delegated for determination to the Corps of Engineers by the second and third clauses of section 10 is "whether the proposed structure or activity would adversely affect navigable capacity." As stated in the first quoted paragraph, however, they simultaneously argue that the Corps "has no authority under section 10" to commence proceedings to determine this question "unless the structure or work would create some kind of obstruction to navigation or navigable capacity." The question which determines the Corps' jurisdiction is thus precisely the same, under this interpretation, as the ultimate question which the Corps is called upon to decide when it reviews a permit application on the merits. That being so, the practical result of adopting this interpretation would be to require the Corps or, as here, some private party to secure a judicial determination that the challenged activity was in fact an obstruction to navigation before the perpetrators of

that activity could be forced to submit to a review and determination of that identical question by the Corps in an administrative proceeding.

The mere statement of this position is almost enough to refute it. Even aside from the perplexing problems of res judicata which might be presented by such a repetitive procedure, the sheer waste of administrative and judicial resources that it would entail is enough to impose on its advocates a heavy burden of clearly demonstrating that Congress has indeed mandated such a cumbersome and inefficient method of enforcing the Act.

The brief of the federal respondents has already adequately demonstrated that the State and the intervenors have utterly failed to carry this burden. As shown therein, there is nothing in the language of the section, its legislative history or any of its subsequent judicial applications that would support the impractical interpretation which these other parties have advocated. Quite to the contrary, as revealed in the government's brief (at pages 27-29), that interpretation has been repeatedly rejected by the decisions of this Court and the lower federal courts and, most tellingly, by the nearly contemporaneous commentary of the individual member of the War Department who was apparently the principal draftsman of the language in question. United States v. Republic Steel Corp., supra at 486-87; Wisconsin v. Illinois, supra at 412-13; Sanitary District of Chicago v. United States, 266 U.S. 405, 429

(1924); United States v. Joseph G. Moretti, Inc., 526 F.2d 1306, 1309 (5th Cir. 1976); Zabel v. Tabb, 430 F.2d 199, 207 (5th Cir. 1970); Tatum v. Blackstock, supra at 401; Hubbard v. Fort, 188 Fed. 987, 994-99 (D.N.J. 1911); Koonce, "Federal Laws Affecting Harbor Works," reprinted in Hearings on Water Pollution Control Legislation - 1971 (Oversight of Existing Programs) Before the House Comm. on Public Works, 92d Cong., 1st Sess. (1971), at page 289. Respondents have nothing to add to the government's discussion of these authorities.

This discussion should be augmented, however, by apprising the Court that the misguided interpretation of the statute now offered by these other parties was also expressly rejected by the Congress itself in the course of the legislative debates preceding the enactment of this section. At one point in those debates, an amendment was proposed by Senator Carlisle of Kentucky which would have required, as a prerequisite to prohibition and removal of an unauthorized structure, a judicial finding that it constituted an obstruction to navigation. 21 Cong. Rec. 8602. The following passages from the Congressional Record reflect some of the comments on this proposal offered by the bill's proponents and its ultimate rejection by the Senate (21 Cong. Rec. 8604, 8690):

> Mr. Gray. I can not imagine any greater source of confusion than this would prove to be if we lodged it in the circuit courts of the United States and nine or more of the circuit courts

all over the country were called upon to decide upon such evidences as they can bring before them whether certain structures are really an obstruction to navigation, called upon to decide a professional and scientific question lying outside of the domain of their education and knowlege entirely.

. . .

Mr. Pugh. Mr. President, will the Senator from Missouri allow me to make an inquiry in the line of his judgment in reference to this matter?

Mr. Vest. Certainly.

Mr. Pugh. Is not the question of obstruction of navigation more a question to be settled by the engineers than it is a judicial question to be settled by the courts?

Mr. Vest. It is, unequestionably.

Mr. Pugh. It seems to strike me that it is a question to be decided by the engineers, and not by a judicial adjudication.

Mr. Vest. That is unquestionable.

. . .

As I said before, we put these questions under the control of the War Department, which acts through the Bureau of Engineers.

As I said yesterday, all the feeling that I could possibly have in regard to this question, all the teachings of my life, are in behalf of the doctrine that every citizen, corporation, or private person should have their day in court; but we are driven by absolute exigencies to this sort of legislation. It is mockery to talk about a suit between these corporations and the Government of the United States, and in the meantime the citizen stands by and sees the navigation of a great river obstructed by a

bridge that ought never to have been put there. What is to become of the navigation of the country whilst this litigation is protracted from one tribunal to another, from one term of court to another? This is the only remedy; and I sincerely hope that the amendment of the Senator from Kentucky will be voted down.

The President pro tempore. The question is on agreeing to the amendment proposed by the Senator from Kentucky [Mr. Carlisle].

The amendment was rejected.

In the light of Congress's action in rejecting this proposed amendment and its stated reasons for that action, it is plain that adoption by this Court of the interpretation now urged by the State and the intervenors would constitute judicial enactment of precisely what the Congress deliberately decided not to enact.

The only additional observation which respondents would offer regarding this particular argument of the State and the intervenors is that they have chosen an especially inappropriate context in which to advance the argument. As it happens, the district court in this particular case fully acceded to their demand for a preliminary judicial determination of whether an obstruction to navigable capacity had been caused by the state's activities in the Delta and concluded that such an obstruction was amply demonstrated by the evidence (Pet. App. 87-92). Indeed, it expressly found that the diversion of water from navigable waterways that had taken place in this case was even greater than

the diversions found to have occurred in Sanitary District of Chicago v. United States, supra - the very case which these parties have held out to this Court as the paradigm of the type of judicial inquiry which their interpretation of the statute would mandate (Pet. App. 86-87 n.22). Respondents of course do not accept the view that the district court's examination of this question was required by the statute, and they agree instead with the federal respondents that the court of appeals' interpretation, which dispenses with the need for these sorts of findings as a prerequisite to the Corps' assumption of jurisdiction, is the correct one. It is nevertheless ironic that, even if this view were to be rejected in favor of an unqualified acceptance of the interpretation offered by the State and the intervenors, the presence of these unchallenged findings of the district court would still require that the judgment be affirmed on this record.

C. The Argument That the Statute Prohibits Only a Physical Disturbance of the Streambed Is Likewise Refuted by Both the Pertinent Authorities and Considerations of Practical Necessity.

The intervenors, though not the State, advance one further argument for which they purport to find support in the language of the statute. This is the contention that the reference to "the channel of any navigable water of the United States" in the third clause of section 10 confines the application of that clause, in the case of navigable rivers, to those activities which

physically disturb the streambed of the river, and precludes its application to any diversion of water from a river, however extensive it may be, which can be effected without causing such a physical disturbance.

Again, the brief of the federal respondents (at pages 29-39) adequately refutes the argument. As indicated therein, such a cramped construction of the statute would permit rampant evasion and frustration of its underlying purpose to protect the capacity of all of the nation's waterways to support navigation. As the government points out, this was precisely the concern which induced this Court to reject an identical restrictive interpretation of the 1890 predecessor statute in United States v. Rio Grande Dam & Irrig. Co., 174 U.S. 690, 708-9 (1899). See also United States v. Republic Steel Corp., supra at 485, 486 (third clause of section 10 covers any modification of "'the capacity of . . . the channel of any navigable water'" or of "'the course, location, condition, or capacity of' a navigable river"). Moreover, as the government's brief also shows, such an interpretation of the clause would effectively import into the statute a wholly different, and far less effective, scheme of regulation for rivers than for harbors, lakes and the several other kinds of waterbodies enumerated in that clause. These respondents would only add that such a result would be particularly irrational in light of the fact that rivers alone, among these enumerated water-bodies, flow from one place to another and hence are

exclusively susceptible to the very type of destruction of their navigable capacity by remote means which this proposed interpretation would authorize. See United States v. Rio Grande Dam & Irrig. Co., supra at 709.

D. The Argument That State Activities Are Exempt from the Statute Is Similary Contradicted by the Statutory Language, the Decisions of This Court and the Legislative History.

The final argument of the State and the intervenors abandons the relatively firm ground of statutory interpretation in favor of an open invitation to the Court to legislate, without any basis in the statutory language or any other form of congressional authorization, a complete exemption of state-authorized water diversions from the prohibitions of section 10. The Court should clearly understand that this is indeed the position these entities are taking. Though there is much talk in their briefs of a mere need to show some "deference" to state concerns and to "harmonize" state and federal interests in applying the federal navigation laws, they have in fact entirely refused to submit their activities to any procedure or process in which such "deference" might be afforded or such "harmonizing" might take place. They have instead, from the outset, relied exclusively on the self-help remedy of simply ignoring the federal navigation laws and the procedures established for their enforcement, and they now openly argue, at other points in their brief, that all of these laws and procedures simply "do not apply" to state-authorized water diversions (e.g., Brief for

California, page 48). They ask, in short, that this Court engraft upon the statute a complete and unqualified exemption for all such state activities.

The numerous faults of the arguments which these parties have conjured in support of this revolutionary proposal are sufficiently catalogued in the government's brief. As is shown there, if stare decisis means anything at all, it requires rejection of the contention that state-sponsored activities enjoy some form of special exemption from the navigation laws, this very contention having been repudiated, either expressly or by implication, in numerous prior decisions of this Court, as well as of the lower federal courts. E.g., United States v. Arizona, supra at 184; New Jersey v. New York, 283 U.S. 336, 344-45, 348 (1931); Wisconsin v. Illinois, supra at 401, 417;* Sanitary District of Chicago v. United States, supra at 426-26, 431-32; United States v. Rio Grande Dam & Irrig. Co., supra at 709; Riggle v. State of California, supra at 982-83; Williamson Towing Co. v. State of Illinois, 534 F.2d 758, 761 (7th Cir. 1976); Monroe County Cons. Council v. Volpe, supra; Zabel v. Tabb, supra at 201-2; Red Star Towing & Transp. Co. v. Department of Transportation,

* In this case, the Court held that the Corps of Engineers was not only not required to exempt a state sewage disposal project from the prohibitions of the Act but was not even permitted to afford any special consideration to the state's sanitation needs where these conflicted with the federal interest in protection of navigation. Id., 278 U.S. at 418.

supra; Neches Canal Co. v. Miller & Vidor Lumber Co., supra at 764-65; James River & Kanawha Canal Parks, Inc. v. Richmond Metropolitan Auth., supra; Citizens Comm. for the Hudson Valley v. Volpe, supra; Lauritzen v. Chesapeake Bay Bridge & Tunnel Dist., supra at 637-38. The government's brief also persuasively disposes of the suggestion that the various reclamation statutes enacted by Congress can be read as implicitly precluding application of the navigation laws to state water projects, including the particular assertion that support for this notion can somehow be derived from this Court's recent expansive construction of these statutes in California v. United States, 438 U.S. 645 (1978). In fact, the Court went considerably out of its way in that case to avoid lending any encouragement to such an interpretation of its decision by using the term "non-navigable" or its equivalent no less than ten times in the course of its opinion. Id., 438 U.S. at 655 n.9, 657, 657 n.11, 658, 661 n.16, 662, 670.

It is an accurate ultimate measure of the utter lack of authoritative support which exists for any different treatment of state projects under the navigation laws that one of the few sources which the State is able to cite for this novel conceit is a 1912 treatise composed by an advocate of local control over western water rights who, in fact, flatly rejects this interpretation of the law and every element of the arguments which the State and the intervenors have mustered in support of it. 1 Kinney, Irrigation and Water Rights

578, 588-97, 1155 (2d ed. 1912). Although the federal respondents have previously pointed out the State's misuse of this source, it is worth quoting this author's actual views at some length, as they administer a fitting coup de grace to this entire unfounded theory (Id., at 590, 591, 594-97):

> There are other methods of destroying the navigable capacity of a body of water than by the construction of bridges, or dams, at navigable points, which we have discussed in previous sections. Dams may be constructed higher up on the stream than the point of navigability, which hold the water back that would otherwise naturally flow down and add to the flow in the navigable portion. . . . The waters from the tributaries of the stream may be diverted from their natural course to such an extent that the capacity for the navigation of the main river may be partially or wholly destroyed. All of these must in time give way to the paramount right of navigation, unless Congress makes some radical changes in the law as it now stands, based upon the theory of the relative importance of interests.
>
> . . .
>
> Congress has seen fit to place the navigation of all the public waters of the United States paramount to all other uses of water. It is true that . . ., by the Act of July 26, 1866, Congress recognized, so far as the United States is concerned, the validity of the local customs, laws and decisions of the courts in respect to the appropriation of water, . . . [and further stated in subsequent enactments] that the provisions therein granted should not be construed to interfere with the control of waters for irrigation and other purposes under the authority of the respective States or Territories. . . [But] in none of these Acts is there any express right given to appro-

priate the waters of any navigable body of water of the United States, or in any way interfere with the navigable capacity of any of these waters. In one of these acts the navigable waters were expressly reserved, notably the Act of 1877, from these appropriations. And, as was said by the Supreme Court of the United States, in the case of the United States v. Rio Grande Dam & Irrigation Co., "to infer therefrom that Congress intended to release its control over the navigable streams of the country and to grant in aid of mining industries and the reclamation of arid lands the right to appropriate the waters on the sources of navigable streams to such an extent as to destroy the navigability, is to carry those statutes beyond what their fair import permits."

Upon the other hand, Congress has passed Acts directly forbidding the interference with the navigable capacity of any of the navigable waters of the United States. By the Act of September 19, 1890, as amended by the Act of March 3, 1899, it is expressly provided, that the creation of any obstruction not affirmatively authorized by Congress, to the navigable capacity of any of the waters of the United States was thereby prohibited; and the section further provides that it shall not be lawful to alter or modify the course, location, condition, or capacity of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of War prior to the beginning of the same. Section 12 of the Act provides for severe penalties against any person or corporation violating any of the provisions of Section 10.

. . .

It is evident that Congress, perceiving that the old rule that a State could authorize any obstructions to the navigability of a stream or body of water of the United States

until interfered with by Congress, was gradually leading to the destruction of the inland waterways of the country as far as the purposes of navigation were concerned, and that the time had come that the navigable waters of the United States should be subjected to the direct control of the National Government, and that nothing should be done by any State tending to destroy the navigability of any of these waters without the explicit consent of the Government.

. . .

Under the statutes of the United States as they are now in force, and as the same are construed by the courts, the irrigation interests, as developed under the laws of the separate States, are not only threatened with serious impairment of their progress in the future, but also interests already in existence are threatened. It must be conceded, as was held by the Supreme Court of the United States, in United States v. Rio Grande Dam & Irrigation Co., that the jurisdiction of the general Government over interstate commerce and its natural highways vests in Congress the right to take all needed measures to preserve the navigability of the navigable water courses of the United States, even against any State action.

As Mr. Kinney observes, no matter how undesirable it may seem from the point of view of the western states that state water diversion projects enjoy no exemption or entitlement to special treatment under the federal navigation laws, this misfortune must simply be tolerated "unless Congress makes some radical changes in the law as it now stands." Id. at 591. The State and the intervenors have asked this Court, by judicial fiat, to make the "radical changes" which Congress has declined to make. Their request is plainly addressed to the wrong forum.

The only further item which respondents would add to the government's refutation of the other parties' argument on this issue is a demonstration that their position is also directly contradicted by the legislative history of the 1899 Act itself. As noted earlier, the principal purpose of this statute, when it was originally enacted in the form of its 1890 predecessor, was to overrule a line of Supreme Court decisions holding that, under existing law, bridges and other projects obstructing navigable rivers could not be prevented either by the federal government or by private parties where these activities had been specifically authorized by state laws or state franchises. Willamette Iron Bridge Co. v. Hatch, supra; Huse v. Glover, supra; Hamilton v. Vicksburg, Shreveport & Pacific R.R. Co., supra; Cardwell v. American River Bridge Co., supra; Escanaba & Lake Mich. Transp. Co. v. City of Chicago, supra; Pound v. Turck, supra; Gilman v. Philadelphia, supra. The intent of Congress to assert the paramount federal authority over navigation and thus to override all forms of state authorized interference with use of the nation's navigable waterways was clearly expressed during the debate on the Act on the floor of the Senate (21 Cong. Rec. 8605):

> Mr. Dolph. I had the honor to represent one of the parties in Hatch & Lonsdale vs. the Willamette Bridge Company, referred to by the Senator from Vermont. The Supreme Court had anticipated the decision in that case and in other cases, notably in The City of Chicago vs. The Escanaba Company, decided some years

previous to the one referred to by the Senator from Vermont, and the Supreme Court has also expressly held that until Congress does assert its power of jurisdiction over navigable streams wholly within the limits of a State, the legislative authority of the States may authorize the construction of bridges across such streams.

Mr. Edmunds. They have gone further than that even, that if it goes outside the State line —

Mr. Dolph. I mean to say at a point where the river is entirely within the boundaries of a State; but it is competent at any time for Congress to assert its authority, and the moment the United States occupies the field and Congress exercises its authority, that moment the power of the State ceases.

Mr. Edmunds. Yes; but my friend from Oregon will agree with me that the court has said - and I think probably rightly in point of law - that the assertion of this power must be made by Congress, and that until it does make it the obstruction of a stream is no violation of any law of Congress and not of the common law, because the United States has no common law; and, therefore, if there is anything to stop it, it is only state law.

Mr. Dolph. That is correct.

Mr. Gray. It was for that purpose that the amendment which I understood was introduced by the Senator from Vermont the other day was offered.*

Mr. Edmunds. Exactly. It was reported from our committee after consideration of the subject.

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* This was the amendment that ultimately became Section 12 of the present Act. See 21 Cong. Rec. 8603, 8607-8.

Mr. Dolph. It is held by the Supreme Court that an act of the State Legislature authorizingthe construction of a bridge, or any other obstruction to a navigable river or navigable water, entirely within the limits of a State, is a sufficient justification of the act.

. . .

But Congress may at any time exert its authority. It does not do that by simply making appropriations for the improvement of a river or authorizing the construction of one bridge over a stream. It would require the express authority of Congress for the assumption of this power and the exercise of the jurisdiction.

Mr. Gray. Gilman vs. Philadelphia is a leading case on that point.

Mr. Dolph. I desire to say that the Senate at the Fiftieth Congress and also at the present session of Congress passed an act [the original Dolph Bill] covering this whole question of the obstruction of navigable waters.

Mr. Gray. Has passed an act?

Mr Dolph. The Senate passed a bill which has been reported favorably in the House and is now on the Calendar there. One section of that bill provides that hereafter whenever a State authorizes a bridge over a navigable stream the plan shall be submitted to the Secretary of War and approved by him before the bridge shall be built. Another section provides that there shall be no piers or bulkheads constructed in a river or other navigable water without the approval of the Secretary of War, and prevents the casting or throwing of sawdust and other material into a navigable river, which would naturally impede navigation.

Mr. Edmunds. Are you speaking of the law?

Mr. Dolph. No; I am speaking of the bill which has passed the Senate at two different sessions,

in answer to what was said by the Senator from Delaware. That bill, as I say, has been reported favorably in the other House and is on its Calendar. It covers the subject of wrecks and of other obstructions to navigable streams, and if passed would be a partial exertion of the power of Congress to regulate the construction of bridges over navigable streams within the States.

The purpose of the original statute to override the states' authority to permit obstructions to navigation, which is so clearly expressed in this colloquy, was nevertheless frustrated when this Court, apparently without examining the legislative history, interpreted the statutory exemption for projects "affirmatively authorized by law" in Section 10 of the 1890 Act as encompassing authorizations by state law as well as federal law. United States v. Bellingham Boom Co., 176 U.S. 211, 215 (1899). One of the few substantive changes which Congress was forced to make in the 1899 recodification was, therefore, to substitute for the quoted words the new language "affirmatively authorized by Congress." 33 U.S.C. §403. This Court has previously acknowledged that the entire purpose of this change was to eliminate once and for all the exemption for state-authorized projects that had been judicially created by the decision in Bellingham Bay Boom Co., supra. Wisconsin v. Illinois, supra at 412; Sanitary District of Chicago v. United States, supra at 428-29. See also United States v. Republic Steel Corp., supra at 504 n.25 (Harlan, J., dissenting); Hubbard v. Fort, supra at 997-98.

Thus, both in the legislative history of the original enactment and by this later corrective amendment, Congress has provided the clearest possible statement of its intention that no implied exemption for state-authorized activities should be read into the Rivers and Harbors Act. In now urging the adoption of just such an exemption, therefore, the State and the intervenors are proposing nothing less than direct contravention of the congressional will.

E. The Contention That the Permit for the Clifton Court Forebay Intake Facility Authorized the Earlier Construction of the Entire Delta Pumping Plant Is Refuted by the Record.

Respondents have little to add to the lower courts' disposition of the rather audacious, if not disingenuous, contention that the entire Delta Pumping Plant was implicitly authorized by the Corps of Engineers' issuance of a permit for a later addition to the plant known as the Clifton Court Forebay Intake (Pet. App. 50-52, 97-99). Even if it were to be assumed that the district court's rejection of this contention is not a finding of fact that is entitled to affirmance unless found to be "clearly erroneous," no basis whatsoever could be found in the record for questioning that court's conclusion that this permit, which fails even to refer to the pumping plant, constituted an official authorization of that facility (Pet. App. 50, 98; Jt. App. 115a-119a). The most that might be permitted by the record is speculation that some private understanding

of the Corps' acquiescence in the existing pumping plant might have accompanied the later issuance of the intake permit. But no legal significance could be attributed to such an understanding in any event in the absence of the required public hearing or of any notice to the public that this permit was intended to authorize more than it appeared to authorize. See 33 C.F.R. §§325.2(a), 325.3, 327.

F. Conclusion

Thus, it has been demonstrated that under any possible sensible construction of the language of the Rivers and Harbors Act the water diversions found to have been carried out by the State of California in this case must be found to be unlawful in the absence of a valid and express permit from the Corps of Engineers. Both of the proposed alternative interpretations of the language of the section relied upon by the State and the intervenors to avoid this result are without any authoritative support and would in any event engender unacceptable practical consequences. As for the further argument that the Court should simply exempt all state water diversions from the terms of the statute, acceptance of this argument would directly contravene the clearest possible congressional expression that no such exemption is to be allowed. Finally, the argument that aall of the State's activities were actually authorized by the Corps of Engineers when it granted a permit for an ancillary addition to the State's facilities is so lacking in support as to border on the frivolous.

CONCLUSION

The court of appeals was correct in its determination (1) that a private right of action exists to enforce the provisions of section 10 of the Rivers and Harbors Act of 1899, and (2) that the statute prohibits the unauthorized water diversions shown to have been carried out by the State of California in this case. The court of appeals' judgment on these issues must accordingly be affirmed.

Dated: December 30, 1980

Respectfully submitted,

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Nos. 79-1252 and 79-1502

SUPREME COURT OF THE UNITED STATES

October Term, 1980

STATE OF CALIFORNIA, et al.,
Petitioners,

v.

SIERRA CLUB, et al.,
Respondents.

KERN COUNTY WATER AGENCY, et al.,
Petitioners,

v.

SIERRA CLUB, et al.,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

AFFIDAVIT OF SERVICE

STATE OF CALIFORNIA)
)ss.
COUNTY OF SAN FRANCISCO)

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No. 79-1252

In the Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF CALIFORNIA, *et al.*,

Petitioners,

vs.

SIERRA CLUB, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Reply Brief of Petitioners State of California, et al.

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INTRODUCTION

The respondents' reply briefs make clear that, with respect to the merits of this case, the litigants disagree on two basic issues. First, does section 10 of the Rivers and Harbors Act of 1899 apply where there is no effect on navigation or navigable capacity? Second, what kind of navigation effect, if any, is required to trigger the operation of section 10 as it applies to state water allocations adopted under state water rights laws? That is, does section 10 apply to such state water allocations, and if so to what extent?

In our opening brief, we argued, with respect to the first question, that section 10 applies only where there is an effect on navigation or navigable capacity. Cal. Br. 52-58. With respect to the second question, we asserted alternative arguments. First, we argued that section 10 does not apply to state water allocations adopted under state water rights laws. Cal. Br. 37-39. Second, we argued that, if the section does apply in this context, the Court should develop common law rules to accommodate the disparate congressional laws in the fields of navigation, reclamation and

water allocation. Cal. Br. 39-43. Under the latter approach, section 10 should apply only where there is a substantial effect on actual navigation. *Id.*

The respondents argue, with respect to the first issue, that section 10 applies whenever there is an effect on the "condition" of navigable waters within the meaning of the third clause of the section, without regard to whether there is an effect on "navigable capacity" within the meaning of the first clause. U.S. Br. 27-29; Sierra Br. 74-75.[1] With respect to the second question, the respondents argue that the Court should interpret section 10 as literally applicable to state water allocations adopted under state water rights laws, and should not develop any common law rules governing its meaning in this context. U.S. Br. 34-43; Sierra Br. 74-75.

In short, we argue that section 10, as applied to state water allocations, applies only where there is a substantial effect on federal navigation interests. The respondents argue that the section applies in this context even where there is no effect whatsoever on federal navigation interests.

As we explain below, the respondents' argument is inconsistent with the congressional intent underlying the 1899 Act, for Congress never contemplated that the Act would apply to state water allocations that have no navigational effects. Moreover, their argument would effectively allow the Corps to intrude into local water matters that have been within the historic province of the states. Finally, and perhaps most importantly, the respondents' argument was specifically rejected by this Court in *United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690 (1899).

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1. The United States comments, however, that the third clause may apply only to alterations or modifications that have a "potential for affecting navigation." U.S. Br. 31. This representation is inconsistent with proposed regulations of the Corps of Engineers that would apply to any structure that affects the "physical capacity," rather than "navigable capacity," of navigable waters. See U.S. Br. 31 n. 20. This representation is also inconsistent with the decision of the Court of Appeals, which holds that the third clause applies to structures that may have no effect on navigation or navigable capacity. See Cal. Pet. App. 24-27. To the extent that the United States concedes that the third clause applies only where there is an effect on navigation or navigable capacity, its views are consistent with our own.

I. The Rivers and Harbors Act of 1899 Does Not Apply to State Water Allocations Adopted Under State Water Rights Laws, at Least in the Absence of an Effect on Actual Federal Navigation Interests.

We turn initially to the second question, *i.e.* whether, and to what extent, the Rivers and Harbors Act of 1899 applies to state water allocations.

A. THE RESPONDENTS' LITERAL ARGUMENT.

The respondents' main argument is that the 1899 Act *literally* applies in this case, and makes no exception for water allocations adopted under state water rights laws. U.S. Br. 33-34, 41; Sierra Br. 74. Significantly, the respondents do not argue that the Act or its legislative history reveal a purposeful congressional intent to authorize the Corps to control the water allocation systems of the western states.[2] They argue instead that the Act and its legislative history reveal no explicit congressional intent *not* to authorize the Corps to exercise jurisdiction over such systems, and thus

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2. The Sierra Club argues that the congressional debates relating to the 1899 Act reveal that Congress meant to apply the Act to *all* structures or activities that might affect navigable waters, including structures or activities undertaken or authorized by the states. Sierra Br. 87-90. The Act was amended to apply to any obstruction "affirmatively authorized by Congress," it is stated, for the very purpose of ensuring that state-approved obstructions are not beyond the scope of the Act. *Id.* As we have noted, however, these congressional debates show only that the Act was intended to apply to state-approved structures, such as "bridges," that are unrelated to the water supply systems established by the western states. Cal. Pet. 23 n. 12; Cal. Br. 18 n. 9. The debates reveal no specific congressional intent to apply the Act to the western states' water supply systems, or to substantially diminish the states' authority to control such systems.

The Sierra Club also argues that the legislative history of the 1899 Act reveals that Congress meant to delegate authority to the Corps to determine whether a structure or activity constitutes an "obstruction" of navigation, rather than have this question determined by the courts. Sierra Br. 76-78. This legislative history shows only that Congress authorized the Corps rather than the courts to determine whether an obstruction is "reasonable," and thus should be legitimized even though it falls within the scope of the general prohibition. See 21 Cong. Rec. 8602 (Reps. Carlisle, Hoar), 8604 (Rep. Gray), 8690 (Rep. Carlisle). See Cal. Br. 57.

that Congress inferentially meant for the Corps to exercise such jurisdiction.

The respondents' literal argument shows no more than that Congress, in passing the 1899 Act, did not specifically address the Act's effect on the congressionally-delegated authority of the western states to allocate water for reclamation purposes. Congress, in passing the 1899 Act, was thus silent on the issue in this case. It cannot be presumed that, because Congress was silent, it meant to substantially abridge the authority which it had previously delegated to the western states to control their water supply systems. Indeed, Congress enacted several laws, both before and after the 1899 Act, that established an historic tradition of deferring to state laws on the subject of water allocation and reclamation. These congressional enactments provide no indication that the states' authority thereunder is subject to the Corps' powers under the 1899 Act. It is thus more significant that Congress has never expressly subjected the states' congressionally-delegated powers to the Corps' authority under the 1899 Act, than that Congress remained silent on the subject in the 1899 Act itself.

In any event, it should not be presumed that Congress intends to depart from its historic policy of deferring to state water rights laws unless it speaks with a clear voice. Since Congress did not speak with a clear voice in the 1899 Act, it cannot be presumed that Congress meant to authorize the Corps to assume jurisdiction over the states' water supply systems. Thus, the more likely inference to be drawn from the congressional silence is that Congress intended no substantial departure from its historic policy of deferring to the states' right to control their own water supply systems.

From the foregoing, it is apparent that Congress, in enacting laws on the subjects of navigation, reclamation and water allocation, has never specifically addressed the potential conflict between these laws, as this conflict arises here. Therefore, no statutory language provides a definitive test for resolving the landmark issue presented in this case. As this Court has held on several occasions, however, the federal courts have often developed com-

mon law rules to fill in the interstices of a congressional regulatory scheme. As this Court recently commented in developing federal common laws relating to water pollution:

> "[W]here there is an overriding federal interest in the need for a uniform rule of decision or *where the controversy touches basic interests of federalism,* we have fashioned federal common law." *Illinois v. City of Milwaukee,* 406 U.S. 91, 105 n. 6 (1972). (Emphasis added.) Accord, *Textile Workers v. Lincoln Mills,* 353 U.S. 448, 456-457 (1957); *Banco Nacional de Cuba v. Sabbatino,* 376 U.S. 398, 421-427 (1964); *Hinderlider v. La Plata Co.,* 304 U.S. 92, 110 (1938).

Since this case "touches basic interests of federalism" concerning the interrelationship between federal and state power in the fields of navigation, reclamation and water allocation, the Court should develop federal common law rules to the extent necessary to achieve Congress' broad goals in these fields.

These congressional goals can also be achieved by more conventional methods of statutory analysis. In *United States v. Rio Grande Dam & Irrig. Co.,* 174 U.S. 690 (1899), this Court held that Congress, in delegating authority to the western states to control water allocations under their water rights laws, did not authorize the states to "destroy" or substantially impair the navigability of navigable waters. See Cal. Br. 42 n. 23. Thus, the Court developed a common law rule that limits the states' rights to allocate water for reclamation purposes in instances where important federal navigation interests are at stake.[3] This common law rule results in a balancing of federal and state powers in the fields of navigation, reclamation and water allocation. In light of this common law rule, federal navigation inter-

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3. The common law rule developed in *Rio Grande* effectively limits this Court's holding in *Willamette Iron Bridge v. Hatch,* 125 U.S. 1 (1888), in which the Court held that the federal common law does not bar obstructions in navigable waters where the interests of other states are not affected. Under *Rio Grande,* the federal common law bars the states from "destroying" navigability in the process of reclaiming their arid lands.

ests are protected even if the 1899 Act is held not to apply to water allocations adopted under state water rights laws.

If, on the other hand, the 1899 Act is held applicable to state water allocations, the Act can still be interpreted in a way that accommodates congressional laws on the subjects of navigation and reclamation. Section 10 of the Act, which prohibits obstructions to "navigable capacity," can be construed, in the context of state water allocations, to apply only to obstructions that *substantially* affect the "capacity" of the waters to support *actual* navigation in the area *where commerce actually takes place.* Thus, the Court could adopt a "rule of reason" test rather than a "per se" test in defining the scope of section 10, as it applies to water supply systems adopted under state water rights laws.

Indeed, this Court, in *United States v. Rio Grande Dam & Irrig. Co., supra,* appeared to adopt such a "rule of reason" test in determining the scope of section 10. The Court stated:

> "The question always is one of fact, whether such appropriation *substantially* interferes with the navigable capacity within the limits *where navigation is a recognized fact.*" 174 U.S. at 709. (Emphasis added.)

Under this test, section 10 does not apply to *every* obstruction that affects navigable capacity. Instead, it applies only to obstructions that *substantially* affect navigable capacity in the area *where commerce is actually carried out,* which inferentially requires consideration of the impact on actual navigation. Thus, this Court in *Rio Grande* rejected the very literal argument that is asserted by the respondents in this case. Instead, the Court developed a common law rule, in the form of a "rule of reason" test, to carry out Congress' goals under the 1899 Act.[4]

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4. This Court has also developed a common law rule with respect to the U.S. Attorney General's enforcement powers under the 1899 Act. In *United States v. Republic Steel Corp.,* 362 U.S. 482, 491-492 (1960), the Court held that the Attorney General has inherent power to enjoin non-structural obstructions under the Act even though the Act does not expressly authorize him to enjoin such obstructions.

This Court appears to have applied the "rule of reason" test in subsequent cases involving an interpretation of the Corps' powers under the 1899 Act. In *Sanitary District v. United States,* 266 U.S. 405 (1925), and *Wisconsin v. Illinois,* 278 U.S. 367 (1929), the Court held the Act applicable to water diversions that reduced shipping capacity in the Great Lakes by more than 3 million tons annually, thus impairing commerce among several states bordering on the Great Lakes. See 266 U.S. at 423, 426; 278 U.S. at 407-409. In *United States v. Republic Steel Corp.,* 362 U.S. 482 (1960), the Court held the Act applicable to industrial waste deposits that decreased the 21-feet draft of a navigable waterway by 4-9 feet, thus preventing many vessels from actually using the waterway. 362 U.S. at 483. Thus, the Court has never applied the Act without reference to the effect of the structure or activity on actual navigation. *A fortiori,* the Court should not do so with respect to water diversions that allocate water among competing users under state water rights laws, since Congress has delegated authority to the states over this subject matter.

The water diversions in this case do not fall within the scope of section 10 under the "rule of reason" test developed in the *Rio Grande* case. The diversions substantially affect navigable capacity in areas where commerce is *not* actually carried out, since they reduce Delta water levels by 1½ feet near Clifton Court Forebay. Cal. Br. 9 n.5. The diversions do *not,* however, substantially affect the capacity of the Delta's waters to support navigation, either actual or hypothetical, in areas where commerce *is* actually carried out; they reduce Delta water levels by only about an inch in the San Joaquin River, where the flow of commerce in the Delta actually occurs. *Id.* The effect of this reduction on actual navigation and commerce is particularly insignificant since the tide alone causes Delta water levels to vary by 3-3½ feet per day. *Id.* In short, the diversions do not substantially affect the capacity of Delta waters to support either actual

or hypothetical navigation in areas where commerce is actually carried out.[5]

The approaches suggested above provide a method for resolving the potential conflict between congressional laws relating to navigation and reclamation in a way that serves the basic aims of both laws. This Court has often held that, if possible, potential conflicts between statutes should be resolved in a way that affords meaning to both statutes. As this Court stated in *United States v. Borden,* 308 U.S. 188, 198 (1939):

> "When there are two acts upon the same subject, the rule is to give effect to both if possible . . . The intention of the legislature to repeal 'must be clear and manifest . . .' There must be a positive repugnancy between the provisions of the new law, and those of the old. . . ."

Our alternative arguments provide a basis for accommodating both national and local goals in the areas of navigation and reclamation.[6]

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5. The Court of Appeals, in ruling that it is irrelevant whether the diversions affect navigable capacity, Cal. Pet. App. 24-27, did not apply the "rule of reason" test formulated in the *Rio Grande* decision. The district court properly invoked the "rule of reason" test, but improperly applied it. According to the district court, the diversions substantially reduce Delta water levels by 1½ feet "in the vicinity of Clifton Court Ferry." Cal. Pet. Supp. App. 31-32. However, this area is near Clifton Court Forebay, which is several miles from interior Delta channels where commerce is actually carried out. The district court's confusion on this issue is reflected in its comments that "water levels *in the San Joaquin River* could be lowered by as much as 1½ feet at low tide," *id.* at 28, even after the court noted that the lowering actually took place at Clifton Court Ferry which, as noted, is a considerable distance from the San Joaquin River itself, *id.* at 28 n. 27. (Emphasis added.) In short, the district court held that the diversions substantially affect navigable capacity in areas where commerce is *not* actually carried out.

If, as suggested above, the Court holds that the water diversions in this case are beyond the scope of section 10 because they do not affect "navigable capacity" under a "rule of reason" test, the Court of Appeals' ruling —in holding that section 10 applies without regard to whether navigable capacity is affected—is material to the outcome of this case. Under that result, the lower court's ruling would not be dictum, notwithstanding our earlier characterization to the contrary. See Cal. Br. 53.

6. The United States argues that our position is undermined by Kinney's treatise on water rights. See 1 Kinney, *Irrigation and Water Rights*

B. PUBLIC POLICY.

In our opening brief, we argued that our views enable the western states and the Corps to exercise their historic functions, and thus result in sound public policy. Cal. Br. 44-48. If the 1899 Act fully applies to state water allocations adopted under state water rights laws, the Act would apply to virtually every reclamation scheme adopted by the western states. *Id.* Under this result, the Corps would have veto power over virtually every water right granted by the western states, even where there may be no significant impact on federal navigation interests. *Id.* The Corps would thus be ultimately responsible for allocating water among competing economic and environmental interests. *Id.* This is a function that has been historically exercised by the states, not the Corps. *Id.*

The respondents do not oppose our argument that their views would sanction a pervasive intrusion by the Corps into water allocation systems adopted under state water rights laws. Instead, they attempt to justify the intrusion. According to the United States, "the policy of deferring to state law respecting water rights where consistent with federal law can be accomodated in the permitting process" by the Corps. U.S. Br. 42.[7] The United States

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(2d ed. 1912); U.S. Br. 39 n.26. Although Kinney followed the literal approach urged by the respondents here, he did not consider our argument that Congress' laws on the subject of navigation and reclamation can be accommodated by the development of common law rules. Moreover, Kinney recognized the force of the policy factors which underlie our argument that the Court should develop such common law rules, stating:

> "In the Western portion of this country the navigable streams are few, and the navigation not very extensive on them. In many portions the agricultural interests are far more important than navigation. . . . Where is this conflict [between navigation and agricultural interests] to end? Is the inferior navigation of these few and small streams to give way to the march of progress, resulting in the settling up of these vast tracts, and the cultivation of more land, requiring more water to properly cultivate? Or is navigation, like the dog in the manger, to stop all this progress, and remain of paramount right as the law of today?" 1 Kinney, *supra* at 591.

These policy factors are served if this Court adopts our approach rather than the literal approach urged by the respondents.

7. A similar argument is made in the amicus brief submitting by the National Wildlife Federation (NWF), in which it is argued that our argument "confuses the jurisdictional question of whether a Corps permit must

suggests that the Corps can issue a "general permit" relating to water allocations authorized under state water rights laws. *Id.* In short, the United States, although conceding the existence of an historic "policy of deferring to state law respecting water rights," argues that this policy can be accomodated by the Corps in the administrative process.

If the Corps has the option of accommodating the historic congressional policy of deferring to state water rights laws, it also has the option of *not* accommodating this policy. Thus, under the respondents' views, there is no assurance that this historic congressional policy will be accommodated within the framework of the 1899 Act. Nothing in the Act, or its legislative history or surrounding historical circumstances, suggests that Congress meant to entrust the Corps with the option of achieving this historic congressional policy. The policy was established by Congress itself, and is not the product of the Corps' administrative largess. Although Congress has never precisely defined the exact interrelationship between federal and state powers in the fields of navigation and reclamation, it never contemplated that this interrelationship would be worked out by the Corps under the 1899 Act.

Indeed, the Corps' own regulations belie the suggestion that the Corps can or will work out a proper interrelationship between federal and state powers in these fields. As noted in our opening brief, the Corps' regulations authorize the denial of a permit on any grounds relating to the "public interest," which the regulations define as involving *inter alia* "food production," "water supply," "economics," "aesthetics," "general environmental concerns," "land use," and "in general, the needs and welfare of the people." Cal. Br. 46. Thus, the Corps has expressly authorized

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be sought with the substantive question of whether a permit should be issued." NWF Br. 25. In short, it is argued that the Corps has jurisdiction over *all* matters that affect navigable waters, and that the Corps—in exercising its jurisdiction—should balance federal navigation and environmental interests against state and local interests in providing a water supply for irrigation and other local uses. *Id.*

itself to inquire into the very factors that the western states examine in determining whether to allocate water for local irrigation, domestic and other uses.

Under the Corps' regulations, for example, the Corps could determine the allocation of water among competing agricultural interests, or between competing agricultural and urban interests, or between competing economic and environmental interests. It could determine, for example, that it is better for Los Angeles to achieve more urban growth than for California's Central Valley to produce more food, or it could determine just the opposite. Moreover, under the respondents' argument, the Corps could make these determinations even though the allocation of water among these competing interests has no demonstrable effect on NWF Br. 27 n.24, the Corps must have authority to consider purely local matters involving "water supply," "food production," "land use," and other such matters, even where there is no demonstrable effect on federal navigation interests. NWF's effort to justify the Corps' intrusion into such local matters belies its argument that the Corps' powers must be interpreted broadly in order to protect federal interests from state interference.

In our opening brief, we asserted alternative arguments that protect national concerns relating to navigation as well as local concerns relating to the development of a water supply for the arid West. Cal. Br. 37-43. Although our argument protects the national concerns that are the focal point of the respondents' briefs, the respondents' argument does not protect the state and local concerns that are the subject of Congress' laws delegating actual federal navigation interests. It is submitted that Congress never intended for the Corps to have such broad control of the economic life and destiny of the western states.

NWF asserts in its amicus brief that Congress, in enacting the 1899 Act, determined that "centralized control and protection of the navigable waterways was properly a federal concern," and thus that Congress entrusted the Corps with authority to carry out this "federal concern." NWF Br. 19, 21-22. If this is so, it is difficult to understand why, as NWF argues later in its brief, see

authority to the states to control their own water supply. Instead, the respondents urge that this Court defer to the administrative judgment of the Corps on this subject, even though the Corps has never historically exercised this function and has no particular expertise on the subject. We submit that our alternative arguments, unlike the respondents' literal argument, provide the accommodation of both national and local concerns that underlie Congress' laws on the subjects of navigation, reclamation and water allocation.[8]

C. CONGRESSIONAL DELEGATION OF AUTHORITY TO THE STATES.

The respondents argue that Congress, in delegating authority to the states to control their water supply systems, did not delegate authority to interfere with substantial federal navigation interests. U.S. Br. 34-38.[9] We do not contend otherwise. We have consistently agreed that Congress, although delegating authority to the states, retains the power under the navigation servitude to ensure

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8. The Sierra Club also argues that, under our second alternative argument, "the question which determines the Corps' jurisdiction is . . . precisely the same . . . as the ultimate question which the Corps is called on to decide when it reviews a permit application on the merits." Sierra Br. 74. This argument mischaracterizes our position. Under our second alternative argument, we argued that the 1899 Act should not be deemed to apply to structures that *substantially* affect actual navigation. Cal. Br. 39. On the other hand, this Court has held that, with respect to structures regulated under the Act, the Corps can approve structures that do not "unreasonably" obstruct navigable capacity. See *Wisconsin v. Illinois*, 278 U.S. 367, 413 (1929). A structure that *substantially* affects actual navigable capacity is not necessarily *unreasonable*. Under our argument, the Corps would thus have discretion to approve or disapprove any structure that substantially affects actual navigable capacity. Sierra Club's assertion that our argument would prevent the Corps from disapproving any structure that falls within its jurisdiction is thus without merit.

9. Specifically, the United States argues that the states' authority under pre-1899 legislation dealing with desert lands and mining is " 'limited by the superior power of the General Government to secure the uninterrupted navigability of all navigable streams within the United States,' " citing the *Rio Grande* decision. U.S. Br. 35. The United States also argues that the rights-of-way acts of 1891 and 1897 did not convey "the right to alter navigable waters in ways that might reduce their navigability." U.S. Br. 36.

the continued navigability of navigable waters. Cal. Br. 25-26. Also, as noted above, this Court held in the *Rio Grande* case that Congress, in delegating authority to the states, did not authorize the states to "destroy" navigability. *United States v. Rio Grande Dam & Irrig. Co.*, 174 U.S. 690, 709 (1899). In short, Congress has constitutional power to protect navigation, and in any event did not authorize the states to destroy navigation. There is no dispute between the litigants on this issue.

In our opening brief, we argued that Congress, in enacting section 8 of the Reclamation Act of 1902, reaffirmed the historic policy of deferring to state water rights laws in the specific context of reclamation. Cal. Br. 28-31. The United States argues that "nothing in the statutory language of section 8 requires or implies that the section was to operate as a limitation on the construction of the 1899 Act." U.S. Br. 37. It is more significant, in our view, that Congress provided no indication in the 1902 Act that the states' broad authority thereunder was subject to the Corps' broad powers under the 1899 Act. If Congress had intended to thus substantially diminish the broad authority conferred on the states under the 1902 Act, it would surely have spoken with reasonable clarity. Congress' failure to address the question in the 1902 Act is an indication that no such diminution was intended.

The United States notes that the states' authority under section 8 of the Reclamation Act of 1902 is limited by the acreage limitation contained in section 5 of the same Act, 32 Stat. 389 (1902), 43 U.S.C. § 431 (1970 ed.), citing this Court's decision in *Ivanhoe Irrig. Dist. v. McCracken*, 357 U.S. 275 (1958). U.S. Br. 38. The United States apparently argues by way of analogy that, since the states' authority under the 1902 Act is limited by the acreage limitation, it is also limited by the Corps' powers under the 1899 Act. The legislative history of the 1902 Act, however, reveals that the acreage limitation was an essential feature of the Act, one that this Court later described as imposing a "specific and mandatory" obligation on federal officials. *Ivanhoe Irrig. Dist. v. McCracken*, *supra* at 291. The analogy asserted by the United States breaks

down because the legislative history of the 1902 Act provides no similar indication that the states' powers thereunder are limited by the Corps' powers under the 1899 Act. Indeed, no reference was made to the 1899 Act in the congressional debates relating to the 1902 Act. The significance of *Ivanhoe,* in our view, is that it provides another example of this Courts' approach in viewing the reclamation laws in their entirety, and in rejecting the notion that one statute should be literally applied without reference to other congressional policies and objectives.[10]

The respondents also argue that we are seeking a disfavored "implicit partial repeal" of the 1899 Act, in that we argue that post-1899 legislation alters the effect of the 1899 Act as it applies here. U.S. Br. 36. This argument mischaracterizes our position. We do not argue that post-1899 legislation implicitly repeals the 1899 Act as applied in the instant context. Instead, we argue that the 1899 Act was never never intended to apply in this context in the first place. Cal. Br. 16-19, 22-26. Under our argument, Congress delegated authority to the western states to control their water supply systems *before* the 1899 Act was passed, principally by legislation relating to desert lands and mining. Cal. Br. 22-26. The post-1899 legislation, particularly that specifically relating to reclamation, reaffirms the states' authority to control their water supply systems, and thus reinforces the view that the 1899 Act was never intended to apply in this context. Cal. Br. 26-36. Indeed, the respondents, by arguing that the 1899 Act alters the effect of earlier statutes delegating authority to the states to control their water supply systems, effectively argue that the 1899 Act implicitly repeals or limits the earlier statutes. Thus, we do not ask the Court "to do the work of Congress," as asserted by the respond-

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10. The United States also states that section 8 is "no barrier to the federal government's exercise of eminent domain powers to acquire water rights" for the federal reclamation projects, citing this Court's decision in *City of Fresno v. California,* 372 U.S. 627 (1963). U.S. Br. 38. The United States overlooks the fact that this Court recently disavowed the dictum in the *City of Fresno* decision on which the United States relies. See *California v. United States,* 438 U.S. 645, 672 n. 24 (1978).

ents. See U.S. Br. 41. Instead, the respondents ask this Court to undo that which Congress has already done.[11]

II. The Rivers and Harbors Act of 1899 Does Not Apply to Structures or Activities That Have No Effect on Navigable Capacity.

To this point, we have argued, first, that section 10 of the 1899 Act does not apply to state water allocations. As an alternative argument, we have argued that, if section 10 applies in this context, the Court should develop common law rules, in the form of a "rule of reason" test, with respect to its meaning. Under the latter approach, the Court should construe the phrase "navigable capacity" in section 10, as denoting only a substantial interference with the capacity of waters to support actual navigation in the area where commerce is actually carried out. Our alternative argument thus hinges on the assumption that section 10 applies only where there is an effect on "navigable capacity" as that phrase is used in the section.

In support of this assumption, we argued in our opening brief that the first clause of section 10 establishes a general prohibition against obstructions to "navigable capacity" within the meaning of the first clause; the other clauses of section 10, as well as section 9, qualify the general prohibition by authorizing the Corps to approve certain such obstructions if they do not "unreasonably" obstruct navigable capacity. Cal. Br. 51-58. The respondents, on the other hand, argue that the third clause of section 10 prohibits any structure or activity that affects the "condition" of navigable waters without Corps approval, even though there may be no effect on "navigable capacity" within the meaning of the first

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11. The United States also asserts that our argument is inconsistent with this Court's decision in *Sanitary District v. United States*, 266 U.S. 405 (1925). U.S. Br. 39. That case involved substantial diversions by the State of Illinois from Lake Michigan for sewage disposal purposes, and the diversions substantially impaired existing commerce on Lake Michigan. That decision is inapposite here for several reasons. First, Congress has delegated unique authority to the western states to control their water supply systems in recognition of the fact that the arid West suffers from unique water supply problems. Cal. Br. 20-22. Specifically, the Reclama-

clause; the Corps can authorize the obstruction, however, only if it does not "unreasonably" obstruct navigable capacity. U.S. Br. 27-29.

We thus argue that the first clause establishes the Corps' general jurisdiction under the Act, and thus that the Corps' jurisdiction is limited to structures or activities that affect "navigable capacity." The respondents argue that the third clause establishes the Corps' jurisdiction under the Act, and thus that the Corps has jurisdiction over any structure or activity that affects the "condition" of navigable waters, even though there is no effect on "navigable capacity." In short, we argue that the Corps has jurisdiction only where there is an effect on federal navigation interests, and the respondents argue that the section applies even where there is no such effect. If our interpretation is correct, the Court can develop a common law rule, or "rule of reason" test, with respect to the meaning of the phrase "navigable capacity" in section 10. If the respondents' interpretation is correct, the Court apparently cannot develop such a rule, since it is irrelevant whether there is an effect on navigable capacity at all.

The respondents' view would effectively deprive section 10 of part of its meaning and significance, and would render the section

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tion Act of 1902 applies only to 16 western states. See 32 Stat. 388 (1902). The Desert Land Act of 1877 applies only to 3 western states and 8 western territories. See 19 Stat. 377 (1877). The Flood Control Act of 1944 applies only to states "lying wholly or partly west of the ninety-eighth meridian . . . ." 58 Stat. 887, 889 (1944). Illinois, as a non-western state, is not a beneficiary of these statutes. Thus, Congress has dealt specially with the West because of its unique water supply problems, and its scheme was not involved in the *Sanitary District* case.

Second, in *Sanitary District,* Illinois did not make the diversions for the purpose of allocating water among competing users, and the diversions were not authorized under Illinois' water rights laws in any event. As we have noted, the authority delegated by Congress to the western states was for the purpose of enabling the states to allocate their water supply among competing users, and—since Illinois' diversions were related to sewage disposal rather than water supply—this congressional purpose was not involved in the *Sanitary District* case.

Third, as explained in our opening brief, the water diversions in *Sanitary District* substantially interfered with actual commerce, unlike the diversions here. Cal. Br. 43 n. 25. Moreover, the diversions in *Sanitary District* interfered with the rights of other states in interstate waters, unlike the diversions here. *Id.*

internally inconsistent. As we explained in our opening brief, the evident purpose of the various clauses in section 10 is to differentiate between various kinds of structures and activities that can be approved by the Corps. Cal. Br. 53. Specifically, section 9 authorizes the Corps to approve a "bridge, dam, dike, or causeway . . . ." The second clause of section 10 authorizes the Corps to approve a "wharf, pier, dolphin, boom, weir, breakwater, bulkhead, jetty, or other structures . . . ." The third clause authorizes the Corps to approve any attempt to "excavate or fill, or in any manner to alter or modify," the "condition" or "capacity" of the waters. Thus, each clause describes a different kind of structure or activity that is subject to Corps approval. The third clause, unlike the other clauses, merely authorizes the Corps to approve certain types of *non-structural activities,* principally excavations or fills. *Id.*

Under the respondents' argument, however, the third clause is not limited to a particular kind of activity. Instead, it authorizes the Corps to exercise jurisdiction over *all* structures or activities that affect the "condition" of navigable waters, even though the structure or activity might also fall within the ambit of another clause. Under this view, the third clause would thus apply to structures and activities that are expressly dealt with elsewhere in the section. For example, a wharf—which is specifically governed by the second clause—could also be governed under the third clause. The Corps, acting under its broad powers in the third clause, could thus prohibit the construction of a wharf on the basis of criteria different from that found in the second clause. Under the respondents' view, section 10 would establish different criteria for the same structure or activity. The section would thus be internally inconsistent. Accordingly, it is clear that Congress meant for each clause to apply to a different kind of structure or activity, rather than for the third clause to authorize the Corps to veto *all* structures or activities regardless of their effect on navigable capacity.[12]

12. In *United States v. Republic Steel Corp.*, 362 U.S. 482 (1960), this Court appeared to similarly interpret the third clause as applicable only to non-structural activities, rather than a basis for Corps control of all struc-

Our interpretation was upheld by this Court in *Wisconsin v. Illinois,* 278 U.S. 367 (1929). There, an action was brought against the State of Illinois by various states on grounds that Illinois was violating the general prohibition contained in the first clause of section 10. The Court rejected the action on grounds that, although the activity in question might be prohibited under the first clause, it had been approved by the Corps under its authority in other clauses. The Court thus indicated, as we argue, that the Corps has power under the second and third clauses to legitimize activities that are otherwise prohibited by the the first clause. Indeed, the Court stated:

> "*The Supreme Court of Maine in Maine Water Co. v. Knickerbocker Steam Towage Co., 99 Me. 473, took the same general view in construction of the same section.* It held that the broad words of the first clause of that section were not intended to limit the second and third clauses[13] and that *Congress' purpose was a direct prohibition of what was forbidden by them except when affirmatively approved by the Chief of Engineers and the Secretary of War.* We concur in this view." 278 U.S. at 413. (Emphasis added.)

The Court's statement—that "Congress' purpose was a direct prohibition of what was forbidden by them except when affirmatively approved by" the Corps—supports our view that the Corps has authority to approve that which the Act otherwise prohibits, and is inconsistent with the respondents' view that the Corps can only approve that which is *not* otherwise prohibited by the Act. Our interpretation is reinforced by the *Wisconsin* decision's adoption of the reasoning provided by the Maine Supreme Court in

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tures or activities that might fall within the ambit of other clauses. The Court, describing the effect of the third clause, stated:

> "Nor may *excavations or fills,* described in the third clause, that alter or modify 'the course, location, condition, or capacity of' a navigable river be made unless 'the work' has been approved by the Secretary of the Army." *Id.* at 486. (Emphasis added.)

13. In context, the Court apparently meant that "the broad words of the first clause of that section were not intended to limit [the Corps' powers to authorize obstructions under] the second and third clauses." In short, even though an obstruction is prohibited under the first clause, it can be authorized by the Corps under the second or third clauses.

Maine Water Co. v. Knickerbocker Steam Towage Co., 99 Me. 473, 59 Atl. 953 (1905), in which the various clauses of section 10 were held to be "qualifications" of the general prohibition contained in the first clause. Cal. Br. 55.[14] The *Wisconsin* decision thus upholds our interpretation of section 10, and rejects that of the respondents.[15]

Ironically, the respondents' interpretation of the Corps' powers under the third clause strengthens our argument that the Court should accommodate federal and state powers in construing section 10 in this case. As noted in our opening brief, the broader the Corps' regulatory authority under the Act, the greater the potential conflict with other congressional laws delegating authority to the states to control their water supply systems; the greater the potential conflict, the less likely that Congress meant for the Corps to intrude on the powers delegated to the states. Cal. Br. 46-47. If, as the respondents argue, the Corps has authority under the third clause over structures or activities that have no navigational effects, the Corps would have veto power over state water rights systems and state reclamation activities, even where there is no perceptible impact on federal navigation interests. Congress surely did not contemplate such a pervasive federal intrusion into

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14. In the *Knickerbocker Steam Towage* case, the Maine Supreme Court stated:

> "[W]e think that the *general prohibition* [in the first clause] is likewise *qualified* by the sentences which follow . . . . [T]he legislative intention was that the *general prohibition* [in the first clause] was to be regarded as subject to specified *qualifications*. When the language [of the first clause] . . . is followed with [the language of the second clause] . . ., the implication seems clear to us that such structures, if built according to plans recommended and authorized as provided in the section, are authorized by Congress . . . and that they are lawful without any further action by Congress." 59 Atl. at 957. (Emphasis added.)

15. The United States argues that its views are supported by a lecture delivered by a Corps official in 1926, more than a quarter-century after passage of the 1899 Act. U.S. Br. 28-29. Even assuming that the lecture is relevant and probative, it is inconsistent with the above-described analysis in the *Wisconsin* decision.

an area traditionally regulated by the states, even in the absence of a distinct federal interest.[16]

CONCLUSION

The fundamental issue in this case is whether the Army Corps of Engineers has authority, under the River and Harbors Act of 1899, to override state water rights systems even where there is no effect on federal navigation interests. The respondents, in arguing that the Corps has such authority, would have the Corps function as a super water agency, one that is ultimately responsible for controlling the allocation of water among competing economic and environmental interests in the West. In enacting the 1899 Act, Congress never contemplated that the Corps would thus occupy a role that has been historically assumed by the states. We argue that this Court should at least develop a common law, or "rule of reason" test, in defining the meaning of section 10, as this Court did in *United States v. Rio Grande Dam & Irrig. Co., supra.* This approach, we believe, results in a proper balancing of federal and state interests which Congress has consistently followed in this area.

Respectfully submitted,

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16. The Sierra Club contends that this petition presents "no question" concerning the Peripheral Canal. See Sierra Br. 3. In our view, the appeal of the district court's decision raised such a question, and in any event we raised such a question in our petition for writ of certiorari. See Cal. Pet. 5-6. The Corps' jurisdiction over water diversions made by the canal depends, in our view, on the same test which this Court adopts with respect to the Corps' jurisdiction over water diversions made by the State pumping plants.

No. 79-1252 and 79-1502

JAN 13 1981

In the Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF CALIFORNIA, ET AL., PETITIONERS

v.

SIERRA CLUB, ET AL.

AND

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.

KERN COUNTY WATER AGENCY, ET AL., PETITIONERS

v.

SIERRA CLUB, ET AL.

AND

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL RESPONDENTS

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AND

CECIL D. ANDRUS, SECRETARY OF THE INTERIOR, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE FEDERAL RESPONDENTS [1]

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1. The private respondents (hereinafter referred to as "Sierra Club") and the National Wildlife Feder-

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[1] The federal respondents are aligned with petitioners in No. 79-1502 on the question addressed in this reply brief. This represents their first opportunity to respond to the arguments of the private respondents on this issue.

ation as amicus curiae (hereinafter referred to as "NWF") contend (Sierra Club Br. 17-47; NWF Br. 7-12) that the Congresses that passed the Rivers and Harbors Act of 1899 and the Rivers and Harbors Act of 1890, on which the 1899 Act was based, must have been familiar with the traditional common law tort rule that a private party may sue to enjoin a public nuisance where he suffers special damages from the nuisance and, therefore, must have also contemplated enforcement of the Acts in federal court by private parties. But the conclusion does not follow from the premise: the common law nuisance actions invoked as models bear little resemblance to enforcement of the 1899 Act, given the scheme for administrative review which Congress included in the Act.

As the court in *Piscataqua Nav. Co.* v. *N.Y., N.H. & H.R. Co.*, 89 F. 362 (D. Mass. 1898), reversed in part on other grounds, 108 F. 92 (1st Cir. 1901), an admiralty case on which both the Sierra Club and NWF rely (Sierra Club Br. 18, NWF Br. 10), explains (89 F. at 363), the special or particular damage that a private party must show in order to maintain an action against a public nuisance—his "actual loss, proved as a matter of fact"—is "the gist of the private action." Under such a theory, a private party whose injury is remediable in damages, recovers a sum of money in an action at law, and one whose injury cannot be thus remedied is entitled to injunctive relief, *e.g.* removal of the nuisance. Recognizing the difficulties inherent in permitting courts to order the removal of structures at the behest of private parties without regard to whether, in the judgment of the Corps of Engineers, the structures are unreasonable obstructions to navigation or even produce conditions in navigable waters that require scrutiny

by the Corps under Clause 3 of Section 10 of the 1899 Act, 33 U.S.C. 403, both the Sierra Club and NWF explain (Sierra Club Br. 65-66; NWF Br. 15-16) that no such relief is sought here.[2] In order to avoid "potential inconsistencies between administrative determinations of the legality of regulated activities and privately initiated judicial determinations of that same issue" (Sierra Club Br. 65), they suggest that the private actions with which they are chiefly concerned involve only ensuring that certain types of activities are submitted for approval (*ibid.*), and that the "carefully designed procedures" for agency review in Section 10 are followed (NWF Br. 15-16). The "gist" of this type of action, however, is not the damages of the plaintiff but the question whether the defendant should seek, or may be granted, an administrative permit.[3]

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[2] At least one court that has allowed maintenance of a private action under Section 10 of the 1899 Act has recognized this problem. In *River* v. *Richmond Metropolitan Authority*, 359 F.Supp. 611, 639 (E.D. Va.), aff'd per curiam, 481 F.2d 1280 (4th Cir. 1973), the court observed:

> It may be that an injunction ordering the removal of an already constructed obstruction is not available to a private litigant, since this form of relief approaches closely the civil remedy given to the United States. The Court can well see how the hardship which such a removal would normally involve might well have prompted Congress to have phrased the statute so that only the United States, in its discretion, might apply for such relief. An injunction against planned construction * * * does not suffer from such infirmities, however.

[3] The district court's findings respecting injury to the Sierra Club and to the two individual plaintiffs were clearly inadequate to sustain the injunctive relief, even assuming that a federal action based on Section 10 of the 1899 Act may be main-

The congressional plan for relying on the expertise of the Corps of Engineers may be accommodated to some degree in private lawsuits where there have been official administrative findings that a structure constitutes an unlawful obstruction of navigation (see *E. A. Chatfield Co.* v. *City of New Haven*, 110 F. 788, 793-794 (D. Conn. 1901) (failure to make alterations to bridge declared by the Secretary of War to be a violation of Section 18 of the 1899 Act, ch. 425, 30 Stat. 1153-1154, and private suit to enjoin maintenance of the bridge allowed to proceed on that finding); but neither this type of accommodation nor what amounts to the "primary jurisdic-

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tained by one suffering special injury different in degree or kind from that suffered by the general public. The district court findings to which the Sierra Club refers (Sierra Club Br. 2) state only that Delta water levels were lowered at certain points and that net flow reversals occurred in the San Joaquin, Old, and Middle Rivers (Pet. App. 88-91), and the stipulated pre-trial order, also relied on (Sierra Club Br. 2) is to the same effect (J.A. 95a). This hardly establishes special injury—or indeed any injury at all—to plaintiff Hank Schramm, who was found by the district court to engage in commercial fishing and to operate sports fishing party boats in San Francisco Bay and the Pacific Ocean, or to plaintiff William Dixon, who was found to be the owner of land in the Delta area and a part interest in a duck club there, but for whom no connection of any kind between the specific flow reversals or water level reductions was found (Pet. App. 67-68). The interests of the Sierra Club members as found by the district court—use of the waters in question "for recreational purposes"—did not differentiate the members from the general public, who could be expected to use the waters for similar purposes and who would suffer injury of the same degree *and* kind as a result of any change in the waters that might prevent such uses. See *Silvey* v. *Commissioners of Montgomery County, Ohio*, 273 F. 202, 204 (S. D. Ohio 1921); *Carver* v. *San Pedro, L.A. & S.L.R. Co.*, 151 F. 334, 335 (S.D. Cal. 1906).

tion" solution proposed by the Sierra Club and NWF is a feature of the traditional common law nuisance action that they presume to find as an implicit part of the congressional scheme in the 1890 and 1899 Acts. While one might argue, as the Sierra Club does (Sierra Club Br. 38-40), that the silence of Congress may not be taken as evidence of an intent to deny a pre-existing remedy, one cannot persuasively argue that a hybrid comprising features of an existing private remedy and a statutory scheme incorporating "carefully designed procedures" for agency review (NWF Br. 15) can be implied from the statute in the absence of any suggestion in the legislative history of an intent to create such a modified remedy.

2. The Sierra Club mistakenly contends (Sierra Club Br. 56-57) that the opinions in *Cummings* v. *Chicago*, 188 U.S. 410 (1903), and *North Shore Boom & Driving Co.* v. *Nicomen Boom Co.*, 212 U.S. 406 (1909), support its position that the 1899 Act includes a private right of action to enforce the Act. In *Cummings*, the plaintiffs sought to rely on the Constitution, several acts of Congress, including the 1899 Act, and a permit from the Secretary of War as sources of a "Federal right" to build a dock in the Chicago River in defiance of the authority of Chicago and the State of Illinois. 188 U.S. at 426-427. The Court merely held that the claim of a federal right established federal question jurisdiction. *Id.* at 426. Such a holding is not inconsistent with the proposition that court enforcement of the 1899 Act against violators is exclusively entrusted to the federal government, as provided in Sections 12 and 17 of the 1899 Act, 33 U.S.C. 406 and 413.

North Shore Boom is similarly unhelpful to the Sierra Club. The Court dismissed this state court

case involving a dispute between two boom companies, each possessing Section 10 permits to construct booms in the same intrastate river, on the ground that the state court's determination that defendant's construction was unauthorized rested entirely on defendant's failure to comply with state law and thus presented no federal question. We agree with the Sierra Club that it would be going too far to say that the Court in that case "intimat[ed] that the underlying cause of action might not be sustainable because of the unavailability of a 'private right of action' to enforce the Act" (Sierra Club Br. 57), but it is surely noteworthy that the Court rejected the defendant's attempt to rely on *United States* v. *Bellingham Bay Boom Co.*, 176 U.S. 211, 218 (1900), in part on the ground that this case "is not brought by the Government under the section above mentioned [Section 10 of the 1890 Act], but * * * concerns private parties only * * *." *North Shore Boom & Driving Co.* v. *Nicomen Boom Co., supra*, 212 U.S. at 413. Moreover, in describing *Bellingham*, the Court stated that the suit there had been "brought to enforce *the right of the Government* to prevent the erection of a structure that obstructed the navigation of the river." *Ibid.* (emphasis supplied).

3. In their discussion of the Senate debate on provisions that were included in the 1890 Act and on related rejected amendments, the Sierra Club and NWF both rely on remarks of Senator Vest to the effect that if the Secretary of War is given no authority to remove a bridge that constitute obstructions to navigation, its removal can be achieved only in a nuisance action brought by private citizens (Sierra Club Br. 36-38; NWF Br. 11). Their discussion of Senator Vest's remarks, however, omits certain important details.

Senator Vest was commenting on the provisions that became Sections 4 and 5 of the 1890 Act, ch. 907, 26 Stat. 453 (later combined as Section 18 of the 1899 Act, ch. 425, 30 Stat. 1153-1154, now codified at 33 U.S.C. 502). 21 Cong. Rec. 8603 (1890). Those provisions make it the duty of the Secretary of War (later the Secretary of the Army), when he has good reason to believe that a bridge constitutes a navigational obstruction, to order the bridge owners to make such alterations in their bridge as the Secretary deems necessary to keep navigation unobstructed; if they fail to comply, the Secretary is to notify the district attorney to initiate criminal proceedings. Senator Vest spoke in favor of entrusting the Secretary with that power to determine that a bridge constitutes an obstruction because the past efforts of private citizens in nuisance actions had met with little success. 21 Cong. Rec. 8603 (1890). The specific example recited by the Senator concerned a group of Missouri citizens who had no money to institute proceedings themselves and who made "[a]pplications * * * to United States authorities at St. Louis" and found that "they had no law under which to proceed." *Ibid.* Senator Vest continued (*ibid.*) (emphasis supplied):

> It goes without saying that when one of these bridges is constructed it stands there until the Federal Government causes it to be removed. There is no power that is able *to enforce* what should be the law in regard to the navigation of rivers except the power of the Government of the United States. * * *

It seems clear from this and from his subsequent remarks concerning the power of the railroad corporations to protract court proceedings (*ibid.*) that

Senator Vest believed that federal *enforcement* of a law against navigational obstructions was the critical need, and that efforts by others were of little, if any use against the resources of the railroad corporations that built most of the offending bridges.

CONCLUSION

For the foregoing reasons, and for the reasons stated in our opening brief, the judgment of the court of appeals should be reversed with directions that the complaint be dismissed for failure to state a claim. Should the Court, however, hold that plaintiffs were entitled to bring this action to enforce Section 10 of the Rivers and Harbors Act of 1899, then the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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Solicitor General

JANUARY 1981

☆ U. S. GOVERNMENT PRINTING OFFICE: 1981 335840 235

Supreme Court, U. S.
FILED
NOV 14 1980
MICHAEL RODAK, JR., CLERK

No. 79-1252

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF CALIFORNIA, et al.,
Petitioners,

v.

SIERRA CLUB, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF AMICI CURIAE STATES OF ARIZONA, COLORADO, IDAHO, KANSAS, MONTANA, NEBRASKA, NEVADA, NEW MEXICO, NORTH DAKOTA, OKLAHOMA, OREGON, SOUTH DAKOTA, TEXAS, UTAH, WASHINGTON, AND WYOMING IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Although the lower court's decision involves several other questions, this brief is confined to the following issue:

> Does the Corps of Engineers have jurisdiction to require a permit under Section 10 of the Rivers and Harbors Act of 1899 for state authorized water diversions, which neither obstruct navigation nor have substantial adverse impacts on navigable capacity.

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No. 79-1252

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF CALIFORNIA, et al.,
Petitioners,

v.

SIERRA CLUB, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT.

BRIEF OF AMICI CURIAE STATES OF ARIZONA, COLORADO, IDAHO, KANSAS, MONTANA, NEBRASKA, NEVADA, NEW MEXICO, NORTH DAKOTA, OKLAHOMA, OREGON, SOUTH DAKOTA, TEXAS, UTAH, WASHINGTON, AND WYOMING IN SUPPORT OF PETITIONERS

INTEREST OF AMICI

The western states named herein as *amici curiae* all have comprehensive systems for the allocation and administration of water. Transformation of the West into an economically productive and socially inhabitable region has been due in significant part to the security afforded by water rights granted under state administrative and judicial procedures.

At an early stage in the development of western water law, indeed before many of the western states had been admitted into the Union, Congress deferred to local law. This Court in *Broder* v. *Natoma Water and Min. Co.,* 101 U.S. 274 (1880), observed that local appropriation rights were "rights which the government had, by its conduct, recognized and encouraged and was bound to protect." *Id.* at 276.

This congressional deference to state water law in the reclamation of the arid western lands has continued, and indeed, was strongly reaffirmed by this Court in its recent decision in *United States* v. *California,* 438 U.S. 645 (1978). There the Court stated:

> "The history of the relationship between the federal government and the states in the reclamation of the arid lands of the western states is both long and involved, but through it runs the consistent thread of purposeful and continued deference to state water law by Congress." *Id.* at 653.

The Court went on to hold that the Secretary of Interior was bound by the Reclamation Act of 1902 to acquire water rights for a federal reclamation project from the State of California, and that further, California could impose any condition in that permit which is not inconsistent with clear congressional directives regarding the project.

In laying the background for its decision, the Court in *California* referred to its earlier decisions in *United States* v. *Rio Grande Dam and Irrig. Co.,* 174 U.S. 690 (1899), and *Kansas* v. *Colorado,* 206 U.S. 46 (1906). The Court discussed the *Rio Grande* case as follows:

> "In *United States* v. *Rio Grande Dam and Irrig. Co.,* . . . [t]he Court noted that there are two limitations to the States' exclusive control of its streams —reserved rights 'so far at least as may be necessary for the beneficial uses of the government property' and the navigation servitude. The Court, however,

> was careful to emphasize with respect to these limitations on the states' power that, except where the reserved rights or navigation servitude of the United States are invoked, the state has total authority over its internal waters. *'Unquestionably the state . . . has a right to appropriate its waters, and the United States may not question that appropriation, unless thereby the navigability of the* [*river*] *be disturbed.'* " 438 U.S. at 662. (emphasis added)

The Court cited *Kansas* v. *Colorado* for additional evidence of congressional deference to state water laws:

> "Similarly, in *Kansas* v. *Colorado,* 206 U.S. 46 (1906), the United States claimed that it had a right in the Arkansas River superior to that of Kansas and Colorado stemming from its power 'to control the whole system of the reclamation of arid lands.' The Court disagreed and held that state reclamation law must prevail . . . federal legislation could not 'overide state laws in respect to the general subject of reclamation.' " 438 U.S. at 663.

The Court in *Kansas* v. *Colorado* reiterated its earlier conclusions in the *Rio Grande* case recognizing the only two limitations on exclusive state jurisdiction over its waters, namely that of reserved rights, and the "power of the general government to secure the uninterrupted navigability of all navigable streams within the limits of the United States." 206 U.S. at 86.

The lower court has either disregarded or misread the long line of decisions by this Court, most recently reaffirmed in *United States* v. *California,* recognizing the primacy of state laws for the appropriation of waters. The Ninth Circuit court has determined that the Corps of Engineers may require a permit under Section 10 of the Rivers and Harbors Act for state authorized diversions for reclamation purposes, on the basis that such diversions amount "to an alteration or modification of the condition or capacity of [the] waters." This result follows,

according to the Ninth Circuit, without regard to the effect of the diversions on actual navigable capacity. Such a decision could have seriously adverse consequences for administration of state water rights in the western states.

The Ninth Circuit's rationale apparently applies to any diversion which would ultimately have some effect on the condition or flow of a navigable stream or lake. According to the Ninth Circuit, such an effect is "presumed" to constitute an obstruction to navigation for purposes of Section 10, and thus a Section 10 permit is required. It would follow that any diversion for consumptive use from a navigable stream or lake, and from any of its tributaries or upper reaches, would come within the purview of Section 10, regardless of the effect of the diversion on navigable capacity.

The right to initiate an appropriation by a diversion for beneficial use is protected under the constitutions of several of the western states. *E.g.* Colo. Const., Art XVI. §§ 5 and 6; D. Harrison and C. Woodruff, *Accommodations of the Appropriation Doctrine and Federal Goals Under Sections 208 and 404 of Public Law 92-500 and Section 10 of the Rivers and Harbors Act of 1899,* 22 Rocky Mtn. Min. L. Inst. 941 (1976). Once water has been diverted and applied to beneficial use, an appropriation is complete giving rise to a water right recognized as a vested property right. *Id.* at 978-79. The denial of a Section 10 permit would thus prevent the accomplishment of an essential prerequisite to the appropriation of water. *Id.* At the least, it would present significant delay, inconvenience and expense to water users, if Corps regulations were imposed with respect to work in connection with water diversions and impoundments and related structures.

The potential adverse impact of the Ninth Circuit's decision is compounded by the fact that the diversions in question first took place several years prior to the initiation of this litigation. If the Ninth Circuit's decision were followed, it would mean that numerous state water right holders in the West would be faced with the possibility that the diversions on

which they have relied for their farms, orchards, and businesses could be subjected to Section 10 jurisdiction, with the result that the diversions could be denied or limited on the basis of "public interest" criteria which did not exist at the time the diversions were initiated. Even in the absence of any demonstrated affect on navigation, there would be no guarantee of compensation for injury to private property rights. Based on the rationale of the Ninth Circuit, the government could argue that assertion of Section 10 jurisdiction was a legitimate exercise of regulatory authority under the Commerce Clause, and therefore no compensation was required.

In appropriation states the property right which arises when water is appropriated generally includes the right to change the point of diversion or place of use of water, provided no injury to other water rights results. *See id.* For a variety of reasons, it may become necessary to change the location or means of the diversion. Thus, an existing structure may need to be moved to a different location or extended further into the stream. Since Corps regulations do not exempt such work, a permit may be required under Section 10. Permit denial under such circumstances would deprive the water right holder of his ability to continue to divert and use the water he has lawfully appropriated. *Id.*

Another serious problem is the potential impact of the Corps permit program on pending projects which are dependent on the continued validity of "conditional" water rights acquired under state law. A conditional water right is obtained through action by the claimant evidencing his intent to appropriate water for beneficial use. Once this prerequisite has been satisfied, if the appropriation is completed with "reasonable diligence," the water right becomes "absolute" and its priority date relates back to the date on which the claimant's intent to appropriate was evidenced. *E.g., Maricopa County M.W.C. Dist.* v. *Southwest Cotton Co.,* 39 Ariz. 65, 4 P.2d 369 (1931); *Morgan* v. *Shaw,* 47 Ore. 333, 83 P.534 (1906); *Moyer* v. *Preston,* 6 Wyo. 308, 44 P. 845 (1896); R. Dewsnup and D. Jensen, *A Summary Digest of State Water Laws* 31-32 (1973).

Like water rights based on completed appropriations, conditional water rights are considered to be vested property rights. *See e.g. Sieber* v. *Frink,* 7 Colo. 148, 2 P.901 (1883); R. Dewsnup and D. Jensen, *supra* at 31.

The conditional decree concept was developed in recognition of the fact that a water diversion project requiring a large investment over a considerable period of time could not be justified without assurance that upon completion the priority date of the water right upon which the project depended would relate back to the date when the project commenced. There are numerous projects throughout the West which rely on conditional water rights. D. Harrison and C. Woodruff, *supra* at 980. If the rationale of the Ninth Circuit is accepted and Section 10 jurisdiction thus expanded, many of these conditional water rights would be threatened with the possibility that a permit for the construction of the diversion or impoundment structure essential for its water supply will be denied. *See id.*

That Congress intended no such results in enacting Section 10 of the Rivers and Harbors Act is clear from the language of the Act, its traditional administrative interpretation, and most importantly, the decisions of this Court. For this reason, and because of the potentially serious adverse consequences of the Ninth Circuit's decision, we urge this Court to reverse.

SUMMARY OF ARGUMENT

The language of Section 10 of the Rivers and Harbors Act of 1899, its administrative interpretation, and most importantly, the decisions of this Court, have made it clear that the Corps' jurisdiction does not extend to activities which neither obstruct navigation nor adversely affect navigable capacity. In view of the deference to state water laws granted by Congress both before enactment of the 1899 Act and since that time, it is also clear that Congress has not delegated to the Secretary of the Army and the Corps of Engineers the authority to require the State of California to obtain their approval for state authorized water diversions for reclamation purposes, in the absence of a

showing of substantial adverse affect on navigation or navigation capacity. This is especially so where the reclamation project is constructed pursuant to the 1902 Reclamation Act. In the absence of any inconsistency with congressional directives respecting the reclamation project, the Corps may not prohibit or condition the state authorized diversion for the project pursuant to Section 10. The Ninth Circuit's decision to the contrary should be reversed.

ARGUMENT

A. Activities which neither obstruct navigation nor adversely affect navigable capacity do not come within the purview of the Corps of Engineers' jurisdiction under Section 10 of the Rivers and Harbors Act.

In the case of *United States* v. *Rio Grande Dam and Irrig. Co.*, 174 U.S. 690 (1899), this Court construed the almost identical predecessor to Section 10. The issue was whether the Act conferred jurisdiction to prohibit a dam on the Rio Grande River at a site in New Mexico where the river was not navigable, on the basis that by diverting most of the flow of the river, the dam would interfere wih its navigable capacity downstream. The Court stated:

> "It is not a prohibition of any obstruction to the navigation, but any obstruction to the navigable capacity, and anything, wherever done or however done, within the limits of the jurisdiction of the U.S. which tends to destroy the navigable capacity of one of the navigable waters of the U.S., is within the terms of the prohibition. . . ." *Id.* at 708.

That the sole basis for asserting jurisdiction under Section 10 is the protection of navigation on the nation's waterways was reaffirmed in *Kansas* v. *Colorado,* 206 U.S. 46 (1906). The Court quoted at length from its earlier decision in *Rio Grande* and then stated:

> "It follows from this that if, in the present case, the national government was asserting, as against either Kansas or Colorado, that the appropriation for the purposes of irrigation of the waters of the Arkansas was affecting the navigability of the stream, it would become our duty to determine the truth of the charge. But the government makes no such contention. On the contrary, it. . .nowhere claims that any appropriation of the waters by Kansas or Colorado affects its navigability." *Id.* at 86.

This view of the jurisdictional scope of Section 10 was again reiterated by this Court in *Wisconsin* v. *Illinois,* 278 U.S. 367 (1929):

> "The true intent of the Act of Congress was that unreasonable obstructions to navigation and navigable capacity were to be prohibited, and in the cases described in the second and third clauses of Section 10, the Secretary of War, acting on the recommendation of the Chief of Engineers, was authorized to determine what in the particular cases constituted an unreasonable obstruction." 278 U.S. at 413.

From these cases, it should be clear that unless the structure or work would create some kind of obstruction to navigation or navigable capacity, the Army Corps of Engineers has no authority under Section 10 to require a permit.

The Corps of Engineers has traditionally administered Section 10 consistently with this premise, so that the primary consideration in determining whether a permit should be issued has been whether the proposed structure or activity would adversely affect navigable capacity. D. Harrison and C. Woodruff, *supra* at 966.

The Attorney General expressed the following opinion in 1925 concerning the function of the War Department in relation to the purposes of the Act:

> "Unquestionably the War Department must take into account, in exercising its administrative discretion, the policy of Congress as disclosed by the statute. The function of the Department is to determine the facts and not the policies. In doing so you must be guided by the clear intention of Congress that navigable waters shall not be so diverted for local purposes as to injure the just rights of the whole people in the navigability of such waters." 34 Op. U.S. Att'y Gen. 410, 417-18 (1925).

Present Corps of Engineers regulations published in 1977 are particularly relevant in this case, since both the Tracy and Delta pumping plant diversions in question are "approximately two miles from navigable water." *Sierra Club* v. *Morton,* 400 F. Supp. 610 (N.D. Cal. 1975). The regulations provide in part:

> "(a) (1) Structures or work are in the navigable waters of the United States if they are within limits defined in 33 CFR part 329. Structures or work outside these limits are subject to the provisions of law cited in paragraph (a) above, if these structures or work affect the course, location, or condition of the water body *in such a manner as to impact on the navigable capacity of the water body.* . . . 33 C.F.R. § 322.3.

Supplementary information accompanying the regulations explained as follows:

> ". . . . any work that is performed outside the limits of a navigable water which affects its navigable capacity may also require a Section 10 permit. *The 1899 Act was enacted to protect navigation and the navigable capacity of the nation's waters,* 42 Fed. Reg. 37122 et. seq., July 19, 1977) (emphasis added).

These regulations make it clear that the Corps itself interprets Section 10 to require more than a mere showing of some impact on the condition of the water body. Contrary to the Ninth Circuit's decision, Corps regulations require that the activity not only affect the condition of the water body, but that it affect it "in such a manner as to impact on the navigable capacity of the water body." In the absence of such an impact, no Section 10 permit is required.[1]

The Ninth Circuit spent little time on administrative interpretation, but instead misconstrued cases not on point and confused the plenary power of Congress over interstate commerce with the delegated authority of the Corps and the Secretary.

The Ninth Circuit places reliance on this Court's decision in *Sanitary District* v. *United States,* 266 U.S. 405 (1925) for the proposition that an effect on actual navigable capacity need not be established as a prerequisite to Section 10 jurisdiction. But as the Ninth Circuit opinion itself discloses, the Court

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[1] An example of the application of the Corps' interpretation of Section 10 is discussed in *National Wildlife Federation* v. *Alexander,* 613 F.2d 1054 (D.C. Cir. 1980). Two county water management districts were constructing a 3.9 mile ditch designed to drain excess surface water into Devil's Lake in North Dakota. Flood waters passing through the channel would flow into Devil's Lake through a preexisting natural coulee. The channel would not encroach into the waters of the lake, although the Eighth Circuit Court found that it would likely raise the water level slightly. Although the Corp considered Devil's Lake as a navigable water of the United States, in the words of the court, the Corps "declined to exercise jurisdiction over the project because its regulations provided that the permit requirement in Section 10 would apply to work occurring outside the water itself only if it would affect the course, location, or condition of the water body in such a manner as to impact on the navigable capacity of the water body." 613 F.2d 1056. The circuit court did not decide whether the Corps' interpretation of its jurisdiction under Section 10 is correct, because it found that Devil's Lake was not a navigable water of the United States and therefore no Section 10 permit was required for the construction of the channel.

reviewed the large diversions from Lake Michigan by the Sanitary District of Chicago and noted "the obvious fact that so large a withdrawal would lower the levels of the lake and *the overwhelming evidence that it would affect navigation.*" *Id.* at 430 (emphasis added). The case thus provides no support for the Ninth Circuit's proposition that an impact on navigable capacity need not be demonstrated.

Curiously, the Ninth Circuit's opinion also cites the Court's decisions in *Wisconsin* v. *Illinois,* 278 U.S. 367 (1929), and *United States* v. *Republic Steel Corp.,* 362 U.S. 482 (1906), as support for its holding. These cases are uniformly cited by commentators as evidencing the fact that Section 10 deals with obstructions to navigation and navigable capacity. *E.g.* Comment, *Environmental Law: Ecology Held Valid Criterion for Denying Dredge and Fill Permit Under Section 10, Rivers and Harbors Act of 1899,* 1970 Duke L.J. 1239, 1243, n.25; D. Harrison and C. Woodreff *supra* at 966, n.56.

As noted previously, the Court in *Wisconsin* v. *Illinois* interpreted Section 10 to prohibit "unreasonable obstructions to navigation and navigable capacity." 278 U.S. at 413. The Court further concluded that the Secretary of Army's limited authority did not include the power to issue a permit merely to aid a sewage disposal project. *Id.* at 418.

In *United States* v. *Republic Steel Corp.* the trial court had found that the depth of Calumet River had been reduced by the discharge of industrial waste by the defendant to 17 feet in some places and 12 feet in others. The lower court also found that the river was used by vessels requiring a 21 foot draft. 362 U.S. at 483-84. On the basis of this evidence, this Court found an obstruction to navigable capacity within the meaning of Section 10. *Id.* at 485. As support for its holding, the Court cited its earlier decisions in *Wisconsin* v. *Illinois* and *Sanitary District* v. *United States,* and stated:

> "The teaching of those cases is that the term "obstruction" as used in Section 10 is broad enough

to include diminution of the navigable capacity of a waterway by means not included in the second or third clauses. In the *Sanitary District* case it was caused by lowering the water level. Here it is caused by clogging the channel with deposits of inorganic solids. *Each affected the navigable 'capacity' of the river.*" *Id.* at 489 (emphasis added).

B. Assuming, arguendo, that Section 10 jurisdiction extends to some activities without regard to their impact on navigation, in the absence of any showing of substantial adverse impact on navigation, the Corps of Engineers does not have jurisdiction under Section 10 to require a permit for a state authorized water diversion.

Even if we assume for purposes of argument that jurisdiction exists under Section 10 over some activities which affect the condition of navigable waters, regardless of the activity's effect on navigable capacity, such jurisdiction does not extend to state authorized diversions for reclamation purposes. In order to correctly understand the jurisdictional scope of Section 10 with respect to diversions authorized under state law for reclamation, it is necessary to appreciate the deference to state water laws granted by Congress both before enactment of the 1899 Rivers and Harbors Act and since that time.

In vast areas of the West rainfall is slight, and land is virtually worthless without an adequate supply of water. For these reasons, western water laws came to be based on beneficial use of water rather than correlative rights and the appropriation theory rather than the riparian. Under the appropriation approach the first to make a beneficial use of water is protected in that right to the extent of its use.

At the time these water laws developed, federal policy stressed disposition of the public domain by encouraging homesteading and settlement. By a series of Acts in 1866, 1870, and 1877, Congress legitimized the appropriation approach

practiced in the western states, and declared that the water on public lands was open to use, and water rights thereto were to be obtained under the laws of the states and territories. It was settled by this Court in *California-Oregon Power Co.* v. *Beaver Portland Cement Co.*, 295 U.S. 142 (1935), that even government patentees had only received land titles and had to acquire water rights in accordance with state law.

As federal activity in the western lands increased, Congress repeatedly included disclaimers in federal enactments of any effect upon or interference with state laws concerning the control, appropriation, use, or distribution of water, or any vested right acquired thereunder. Such a disclaimer preserving state control over reclamation was included in an 1897 federal reclamation act. This Court in its recent decision of *United States* v. *California*, 438 U.S. 645 (1978), discussed this provision which was proposed as a floor amendment. The Court stated:

> "It was clearly the opinion of a majority of the congressmen who spoke on the bill, however, that such an amendment was unnecessary except out of an excess of caution. According to Congressman Lacey, Chairman of the Committee on Public Lands, and a principal sponsor of the 1897 Act, the water through which the reclamation would be accomplished 'does not belong to the [federal] government. The reservoirs in which the water is stored belong to the government, but the water belongs to the states and will be controlled by them. The amendment proposed by the gentleman from Illinois relieves this measure from all possible doubt upon that subject. I think there could be no doubt anyhow, but this amendment takes away the possibility of any question being raised as to the right of the states and territories to regulate and control the management and the prices of the water.' " 438 U.S. at 661-62.

This Court then went on to note that "Congressman Lacey's statement found reflection in contemporaneous deci-

sions of this Court holding that, *with limited exceptions not relevant to reclamation,* authority over intrastate waterways lies with the states." *Id.* at 662 (emphasis added). The Court then discussed its holding in *United States* v. *Rio Grande Irrigation Co.,* 174 U.S. 690 (1899), citing the following language:

> "Unquestionably the state . . . has a right to appropriate its waters, and the United States may not question that appropriation, unless thereby the navigability of the [river] be disturbed." 438 U.S. at 662.

The California Water Project represents a comprehensive scheme for the reclamation of the more arid regions of central, coastal and southern California. It consists of dams, canals, pumping plants and other facilities designed to generate power, provide flood control and transfer water. Both the pumping plants in question are central to this reclamation project. The limited exceptions to state control over water resources which this Court noted are not relevant to reclamation generally, are likewise not applicable to limit the state's authority in this case. In the absence of a showing of substantial adverse effect on navigation, Congress had not delegated to the Secretary of the Army and the Corps of Engineers the authority to require the State of California to obtain their approval for these diversions.

C. The Corps of Engineers does not have jurisdiction to require a Section 10 permit for a state authorized diversion in connection with a federal reclamation project authorized under the 1902 Reclamation Act, so long as the state authorization is not inconsistent with clear congressional directives concerning the project.

While the Ninth Circuit found congressional approval under Section 10 in various congressional funding authorizations for the Tracy Plant, it reached the issue by erroneously concluding that Section 10 jurisdiction extended to the diversion made by the plant. That this is not the case follows unequivocally from this Court's holding in *United States* v.

California, 438 U.S. 645 (1978). The Tracy Plant is part of the Central Valley Project authorized by the 1902 Reclamation Act, 32 Stat. 388 (1902), 43 U.S.C. §§ 371-421 (1970). In *California,* this Court made it clear that the Reclamation Act required the Secretary "to appropriate, purchase or condemn necessary water rights in strict conformity with state law." 438 U.S. at 665. Further, the Court stated:

> "Once the waters were released from the dam, their distribution to individual landowners would again be controlled by state law. As explained by Senator Clark of Wyoming, one of the principal supporters of the reclamation bill in the Senate, 'the control of the water after leaving the reservoirs shall be vested in the States and Territories through which such waters flow.'" *Id.* at 667.

This Court went on to hold in *California* that the state could impose any condition on the control, appropriation, use or distribution of water through a federal reclamation project that is not inconsistent with clear congressional directives respecting the project. *Id.* at 665, 667, 672.

Applications to appropriate unappropriated water for the Central Valley Project were originally filed with the state in 1927 and later assigned to the United States Bureau of Reclamation. Dept. of Water Resources, *Delta Water Facilities—Bulletin 76,* 30 (Cal. July, 1978). The Bureau also filed a number of additional applications in its own behalf. Commencing in 1959, the California State Water Rights Board held hearings on the principal applications for the CVP, including those to divert and redivert water from the Delta. *Id.* In 1961, that Board issued Decision 990 which ordered issuance of permits to the USBR but reserved jurisdiction to fix at a future date the requirements for salinity control in the Delta and the coordinated operation of the Central Valley Project and the State Water Project. *Id.*

The state's authority to authorize and condition the permits for the Tracy Pumping Plant diversion was clearly within its prerogatives under the Reclamation Act as construed by this Court in *California.* It is entirely inconsistent with this Court's decision to now assert that Section 10 jurisdiction applies. The result of the Court's rationale could mean that a state authorized diversion for a federal reclamation project could be prohibited, limited or conditioned by the Secretary of the Army and the Corps of Engineers.

In the process of reaching such a conclusion, the Ninth Circuit mistakenly relied on language in decisions by this Court recognizing the plenary power of Congress over navigation. Thus, the court quotes a portion of the decision in the *Rio Grande* case that "as to navigable waters nothing should be done to obstruct their navigability without the assent of the national government." The Court further cites language from the Court's decision in *Sanitary District* v. *United States,* 266 U.S. 405 (1925), that "there is no question that this power [to remove obstructions to interstate and foreign commerce] is superior to that of the states to provide for the welfare or necessities of their inhabitants."

It is clear that the federal government's power under the Commerce Clause could override state actions to promote reclamation. But the question which is paramount in this case is whether the Secretary and the Corps have been authorized by Congress in Section 10 of the Rivers and Harbors Act to prohibit or regulate activities, decisions concerning which it has deferred to the states under the Reclamation Act of 1902. It is submitted that the decisions of this Court clearly establish that no such authority exists.

To the contrary, this Court's holding in *California* was that the state may impose any condition in a water right permit respecting the use and distribution of water through a federal reclamation project "that is not inconsistent with clear congressional directives respecting *the project.* There has been no contention in this case that the permit issued to the Bureau of

Reclamation to divert water from the Delta through the Tracy Pumping Plant, or the conditions placed on that permit, are inconsistent with clear congressional directives respecting the Central Valley Project. Indeed, the Ninth Circuit concedes that "it is manifest from the legislative history that Congress was well aware of the Tracy Pumping Plant as part of the Central Valley Project, fully approved of it, and consistently encouraged its construction and *operation.*" Under such circumstances, Section 10 simply does not apply. The Ninth Circuit erred in holding to the contrary.

CONCLUSION

Decisions regarding the allocation of unappropriated water among competing demands have dramatic significance in the western states. In determining where water will be diverted and used, a decision is directly made as to the locale of future growth and community development. In addition, by allocating an amount of unappropriated water to a selected beneficial use, the supply available for competing uses also within the state's legitimate concern is reduced. These decisions although they will ultimately have import to some extent to the nation as a whole, have a significantly more profound effect on the development of the state, as they will shape the priorities for water uses between the states' farmers, cities and industries, and between these uses and competing environmental uses. Thus, determinations as to the use of water in the West involve a delicate and complex balancing of benefits and costs associated with each competing use of water and the area of use. In exercising this responsibility, the states have developed elaborate administrative machinery which insures that the public will be allowed to fully participate in appropriation hearings, and to provide information relating to competing water needs.

On the other hand, it is not realistic to assume that the Secretary of Army and the Corps of Engineers has a comparable level of interest regarding water management affairs, unassociated with navigation, within an individual state. Nor is

it realistic to assume that the Corps has the time or expertise to involve itself in state water management, even assuming an inclination to do so. Congress was undoubtedly influenced by these considerations of public policy in providing for state control of the acquisition, use and distribution of waters within its boundaries for purposes of reclamation.

The Ninth Circuit holding is contrary to what this Court described as the "purposeful and continued deference to state water law by Congress." Without regard to the legitimate purpose of Section 10 to protect the navigable capacity of the country's waterways, the Ninth Circuit raises the potential of federal encroachment into matters which Congress has wisely deferred to the states. In the process, the Ninth Circuit misconstrues or disregards the relevant decisions of this Court. We therefore urge the Court to reverse the Ninth Circuit's decision in this case.

Respectfully submitted,

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Nos. 79-1252 and 79-1502

IN THE

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STATE OF CALIFORNIA, *et al.*,
Petitioners,

v.

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE NATIONAL WILDLIFE FEDERATION AND FOR OPERATION WILDLIFE, AS *AMICI CURIAE*, URGING AFFIRMANCE

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BRIEF FOR THE NATIONAL WILDLIFE FEDERATION AND FOR OPERATION WILDLIFE, AS *AMICI CURIAE*, URGING AFFIRMANCE

INTEREST OF AMICI

The National Wildlife Federation (NWF), the country's largest non-governmental conservation organization, is dedicated to the wise use and management of the country's natural resources. Operation Wildlife (formerly California Natural Resources Federation) is a non-profit, tax-exempt citizens conservation group affiliated with the NWF with some 1,500 members throughout California. It is committed to generating public interest in wildlife and improving conservation education through organized school programs and informal public education projects. The members of NWF and Operation Wildlife are espe-

cially interested in the protection of our nation's water resources and thus have a compelling interest in the availability of private actions to require thorough federal review of water diversion projects under the Rivers and Harbors Act of 1899, and the scope of Section 10 of that Act, both at issue in this litigation.

CONSENT OF THE PARTIES

Amici are filing this brief with the consent of all parties, whose letters of consent have been filed with the Clerk.

SUMMARY OF ARGUMENT

California's Delta pumping plant, which has been operating since 1967, is an integral component of one of the largest water diversion projects in history. The pumping plant alone has the capacity to remove from the Sacramento-San Joaquin Delta millions of acre-feet of water each year.

The federal government now concedes that this massive redistribution of water from a navigable channel is prohibited by Section 10 of the Rivers and Harbors Act of 1899 ("1899 Act"), 33 U.S.C. § 403, unless approved by the U.S. Army Corps of Engineers ("Corps"). Yet, for thirteen years the federal government has done nothing to remedy this conspicuous violation of the law. Because no enforcement action was forthcoming from the Department of Justice, it was necessary for private parties to initiate this lawsuit seeking to enjoin the violation pending review by the Corps in order to protect their interests under the 1899 Act and subsequent legislation.

Amici NWF and Operation Wildlife urge affirmance of the Circuit Court's holding that Congress intended to afford a private cause of action in the 1899 Act. Congress' intent is best evidenced by the circumstances of the statute's enactment, for the Act was passed in direct response to a case denying private plaintiffs a cause of action in federal court. Given the prevailing common law doctrine of public nuisance, Congress justifiably pre-

sumed and intended the Act's prohibitory language would create, without more, a private cause of action for citizens injured by violations. The legislative history makes clear that Congress intended the 1899 Act's criminal sanctions to supplement rather than supplant these implicit private remedies. Finally, Congress must have intended to afford a private right of action, since that right of action is essential to the legislative goal of prompt, effective enforcement against all violators, including the federal government itself.

Amici NWF and Operation Wildlife also urge affirmance of the Circuit Court's conclusion that Section 10 requires Corps approval of the Delta pumping plant. Contrary to the assertions of petitioners State of California, et al. ("California") and petitioners Public Water Agencies ("Water Agencies"), Congress intended no exemption of state water allocation projects from the provisions of the 1899 Act. This Court has previously found Section 10 to be fully applicable to state activities affecting navigable waterways. Congress possesses and has exercised in the 1899 Act its broad authority to preserve and protect the nation's waterways, and it has declared in unmistakable terms that *any* activity that significantly impacts a federal waterway must receive prior federal approval. California's activities, which entail the annual diversion of millions of acre-feet of water from the Delta and result in lowered water levels and reversals in directional flow, are clearly subject to the provisions of Section 10.

ARGUMENT

I. THE CIRCUIT COURT CORRECTLY HELD THAT PRIVATE CITIZENS INJURED BY VIOLATIONS OF THE RIVERS AND HARBORS ACT OF 1899 MAY SUE TO ENJOIN THOSE VIOLATIONS PENDING ADMINISTRATIVE REVIEW.

This Court has previously held that the rights and remedies which Congress intended under the 1899 Act extend beyond those explicitly enumerated. *Wyandotte*

Transp. Co. v. *United States*, 389 U.S. 191 (1967); *United States* v. *Republic Steel Corp.*, 362 U.S. 482 (1960). The first issue in this case is whether Congress could have intended the broad panoply of implied rights recognized in *Wyandotte* and *Republic Steel*, but meant to deny the limited cause of action sought here.[1]

As the Court recently confirmed in *Cannon* v. *University of Chicago*, 441 U.S. 677, 688 (1979), the starting point for ascertaining the existence of an implied right of action is the analysis set forth in *Cort* v. *Ash*, 422 U.S. 66, 78 (1975). Recent cases have stressed that the central inquiry remains whether Congress intended to create a private right of action, and that the four *Cort* v. *Ash* factors should be viewed as the "criteria through which this intent could be discerned." *Transamerica Mortgage Advisors, Inc.* v. *Lewis*, 444 U.S. 11, 16-17, 24 (1979); *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 568, 575-576 (1979); *Davis* v. *Passman*, 442 U.S. 228, 241 (1979).

The excellent opinions below ably demonstrate that each of the *Cort* v. *Ash* factors are amply satisfied in the instant case. Rather than duplicate that analysis here, Amici will focus on two fundamental aspects of the 1899 Act which best evidence Congress' intent to create a private right of action. First, a close examination of the historical context of the 1899 Act and its predecessors reveals a congressional presumption and intention that the 1899 Act would afford a private right of action.[2]

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[1] The precise implied cause of action asserted here is a narrow one. Respondents Sierra Club, et al. have asserted, and the lower courts have found, only a cause of action to enjoin violations of the Act pending the prescribed administrative review by the Army Corps of Engineers. As in Allen v. State Bd. of Elections, 393 U.S. 544, 555 n.19, 556 (1969), "[i]t is important to distinguish" cases brought to invoke administrative procedures from cases brought to litigate the substantive questions concerning permit approval.

[2] There is, of course, no express statement of congressional intent in the Act. Had Congress expressly granted or denied a private action, discerning an implication would be unnecessary. The

Second, Congress must have intended a private action since, as this case demonstrates, the government is inherently incapable of enforcing the Act against itself and lacks the resources to enforce it effectively against others.

A. The Circumstances of Enactment, Legal Context and Legislative History All Evidence Congress' Intent to Create a Private Right of Action.

1. *The Act Was a Legislative Reversal of the Result Reached in the* Willamette Bridge *Case.*

Congress' intention to safeguard the interests of private parties injured by obstructions to navigation is well evidenced by the circumstances surrounding the enactment of the Rivers and Harbors Act of 1890 (the "1890 Act"), the predecessor to the 1899 Act. The 1890 Act was a direct response to this Court's decision in *Willamette Iron Bridge Co.* v. *Hatch*, 125 U.S. 1 (1887) and a legislative reversal of the result reached there.

In *Willamette*, plaintiffs Hatch and Lownsdale sued in federal court to enjoin the construction of a bridge which they contended would block the passage of their boats and would generally obstruct the navigation of the river. *Id.* at 3-4. The lower court held that the case was one arising under the laws of the United States and found for the plaintiffs. The Supreme Court reversed, concluding that there was no federal statute regulating the bridge in question and thus there was no federal jurisdiction. "There must a direct statute of the United States in order to bring within the scope of its laws, as administered by the courts of law and equity, obstructions and nuisances in navigable streams within the States." *Id.* at 8.[3]

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legislative history is "equally silent or ambiguous." Cannon v. University of Chicago, *supra*, 441 U.S. at 694. This circumstance is neither surprising nor determinative. Transamerica Mortgage Advisors, Inc. v. Lewis, *supra*, 444 U.S. at 18.

[3] The Court noted in passing that there is no federal common law of nuisance, 125 U.S. at 8, but this comment was intended to

Congress acted quickly to provide such a statute. In successive sessions of Congress in 1887 and in 1889, the lawyer who had represented the plaintiff in *Willamette*, Senator J. N. Dolph of Oregon, introduced legislation to supply the federal statute necessary to give federal courts jurisdiction over cases involving obstruction of navigable waterways.[4] These earlier bills culminated in the 1890 Act, and later the 1899 Act. *See United States* v. *Republic Steel Corp.*, *supra*, 362 U.S. at 499-504 (Harlan, J., dissenting).

The 1890 Act's legislative history leaves no doubt that the law constituted a direct response to plaintiff Hatch's failure to obtain relief in federal court. The Senate debate preceding the passage of the 1890 Act contains numerous references to the *Willamette* case. *See* 21 CONG. REC. 8605-07 (1890). Senator Dolph expressly referred to his representation of Hatch in *Willamette* and urged Congress to pass legislation which would alter the results of that case. *Id.* at 8607. Congress clearly intended the 1890 Act to provide what the *Willamette* case denied: access to a federal court, and ultimately, to a federal decision-maker,[5] for private plaintiffs seeking to chal-

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mean only that there was no federal common law of nuisance which would confer "arising under" jurisdiction. The Court cannot have meant that there was no federal common law to apply once the parties were properly in federal court. Under Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842) a court was free to apply federal common law of nuisance to claims brought in federal court, and the federal courts had been applying federal common law of nuisance for many years. *See, e.g.*, Railroad Co. v. Mississippi, 102 U.S. 135 (1880); Pennsylvania Ry. Co. v. Baltimore & N.Y. Ry. Co., 37 F. 129 (S.D. N.Y. 1888); Missouri River Packet Co. v. Hannibal & St. Joseph R.R. Co., 2 F. 285 (W.D. Mo. 1880).

[4] Justice Harlan traced Senator Dolph's efforts and the "tortuous" legislative history of the 1899 Act in his dissent in United States v. Republic Steel Corp., *supra*, 362 U.S. at 493, 499-504.

[5] The 1890 Act vested final authority to determine the validity of an obstruction in the Secretary of War rather than the federal circuit courts. 26 Stat. 426, 454. Under the statutory scheme, the Secretary of War was the final decision-maker concerning the rea-

lenge obstructions to navigable waterways that harm important public and private interests.

2. *Given the Prevailing Common Law Doctrine of of Public Nuisance, Congress Assumed and Intended that the Act Would Create a Private Right of Action.*

An evaluation of the congressional response to the *Willamette* case requires an analysis of the legal context in which the legislature worked. *See Cannon* v. *University of Chicago, supra*, 421 U.S. at 698-699. In 1890, congressional assumptions concerning the law of obstructions were based on the prevailing common law doctrine of public nuisance. Against this background, the solution to the problem created by *Willamette* was clear: a statute asserting the missing federal jurisdiction over navigable waterways and forbidding unauthorized obstructions which would, without more, create a private right of action in favor of plaintiffs like Hatch.

The law of public nuisance was well settled by 1890. In 1838, this Court explicitly adopted the long established English position [6] and held that although a public nuisance is the subject of criminal jurisdiction and the "ordinary and regular proceeding at law is by indictment or information," there is a private cause of action for people who sustain special damage due to the erection of an obstruction. *City of Georgetown* v. *Alexandria Canal Co.*,

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sonableness of an obstruction; the role of the federal courts was to enjoin construction at the behest of private parties or the Department of Justice until the Secretary of War had acted on the permit application.

[6] Since the middle ages, the obstruction of public passages had been considered a public nuisance punishable by the sovereign as a crime. *See* Prosser, *Private Action for Public Nuisance*, 52 VA. L. REV. 997, 998-999 (1966). Although English courts initially held that private citizens injured by such obstructions had no right to sue, this position was repudiated centuries ago and by 1536 the courts had implied a private right of action based on the criminal offense. *See id.* at 1005.

37 U.S. (12 Pet.) 91, 97-99 (1838).[7] Following *City of Georgetown*, the federal courts repeatedly reaffirmed the availability of a private cause of action for persons injured by unlawful obstructions in navigable waterways.[8] Moreover, the federal courts traditionally looked to congressional enactments to determine if a structure was unlawful.[9] If the structure did not meet the conditions imposed by Congress, it was unlawful and a public nuisance. "It is sufficient to say that if the structure is not according to the limitations of the act of congress it is so far unauthorized, and the defendant is, therefore, liable for any injury to the plaintiff's vessel which was caused, or contributed to, by the unlawful structure." *Missouri River Packet Co.* v. *Hannibal & St. Joseph R.R. Co.*, 2 F. 285, 291 (W.D. Mo. 1880).

Thus, at the time of the 1890 Act it was well established that an obstruction which failed to conform to the restrictions imposed by Congress was actionable by private plaintiffs. Congress must have assumed that the same result would flow from the 1890 Act, for the concept of an illegal obstruction was inextricably intertwined

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[7] The reason for permitting private rights of action even where the government has enforcement authority was succinctly stated by Chief Justice Park in Wheller v. Bedford, 54 Conn. 244, 249 (1886): "But suppose the authorities are unwilling to institute proceedings. Where then will be the ample remedy? They are not bound to redress the plaintiff's private grievances."

[8] *See e.g.*, Railroad Co. v. Mississippi, 102 U.S. 135 (1880); Pennsylvania v. Wheeling & Belmont Bridge Co., 54 U.S. (13 How.) 518, 564 (1851); Texarkana & Ft. S. Ry. Co. v. Parsons, 74 F. 408 (8th Cir. 1896); Pennsylvania Ry. Co. v. Baltimore & N.Y. Ry. Co., 37 F. 129 (S.D.N.Y. 1888); Missouri River Packet Co. v. Hannibal & St. Joseph R.R. Co., 2 F. 285 (W.D. Mo. 1880). *See* Smith, *Private Action for Obstruction to Public Right of Passage*, 15 COLUM. L. REV. 1, 16 (1915).

[9] At least as early as 1880 it was established that federal courts had jurisdiction in cases by private plaintiffs challenging obstructions to navigable waterways where an evaluation of the lawfulness of the structure required an interpretation of federal law. *See* Railroad Co. v. Mississippi, 102 U.S. 135 (1880).

with a private right of action for persons injured by such obstruction.[10]

An analogous meshing of common law and statutory standards was addressed in *Transamerica Mortgage Advisor, Inc.* v. *Lewis, supra*, 444 U.S. at 18-19 in which this Court implied a private cause of action under section 215 of the Investment Advisors Act of 1940 for rescission of contracts declared "void" in that act. The Court held that when Congress declared certain contracts void, "it intended that the customary legal incidents of voidness would follow." *Id.* at 19. In this case Congress similarly must have intended the customary legal incidents of declaring an obstruction illegal.[11]

Any doubts concerning judicial implication of a private right of action that existed when the 1890 Act was passed were removed prior to the 1899 Act by interven-

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[10] The vitality of the common law nuisance doctrine continues today. Illinois v. City of Milwaukee, 406 U.S. 91 (1971). Indeed, the federal government, while arguing against a limited private right of action in this case, has elsewhere conceded a private right to invoke the federal common law of nuisance in federal court. Middlesex County Sewage Authority v. National Sea Clammers Assoc., *cert. granted*, Nos. 79-1711, 1754, 1760 (Oct. 21, 1980), Brief for Federal Respondents on Petition for Writ of Certiorari at 6-7. Arguably, this doctrine provides an alternative rationale for upholding the decision below, but the Court need not go so far. Amici contend only that Congress was aware injured citizens would be able to invoke the 1899 Act in nuisance actions seeking broad equitable and legal relief and must have intended that the lesser included statutory action for injunction pending administrative review be available as well.

[11] In *Transamerica*, the Court rejected the suggestion that Congress intended claims under § 215 to be raised only in state court, stating, "we decine to adopt such an anomalous construction without some indication that Congress in fact wished to remit the litigation of a federal right to the state courts." 444 U.S. at 19 n.8. It would be even more anomalous in this case to conclude that Congress intended private parties suing under the Rivers and Harbors Act to be limited to state court since the 1890 Act was intended to supply the federal jurisdiction found lacking in *Willamette*.

ing federal court decisions. During the period from 1890 to 1899, at least two federal courts permitted private parties to recover damages because of violations of the Act. *See Texarkana & Ft. S. Ry. Co.* v. *Parsons*, 74 F. 408 (8th Cir. 1896); *Piscataqua Nav. Co.* v. *New York, N. H. & H. R. Co.*, 89 F. 362 (D. Mass. 1898).[12] As it is "always appropriate to assume that our elected representatives, like other citizens, know the law . . .," *Cannon* v. *University of Chicago*, *supra*, 441 U.S. at 696-697, Congress' decision to reenact the statute in 1899 without negating the results reached in those cases can only be viewed as an endorsement of those interpretations.

Certainly, this was the view of the federal courts best positioned to understand Congress' intent. In a line of cases beginning in 1901, federal courts explicitly found a private right of action under the Act. *See, e.g., Neches Canal Co.* v. *Miller & Vidor Lumber Co.*, 24 F.2d 763 (5th Cir. 1928); *Carver* v. *San Pedro, L.A. & S.L.R. Co.*, 151 F. 334 (S.D. Ca. 1906); *E.A. Chatfield Co.* v. *City of New Haven*, 110 F. 788 (D. Conn. 1901). In addition, this Court reached the merits in several Section 10 cases, apparently assuming the existence of a private right of action. *See Wisconsin* v. *Illinois*, 278 U.S. 367 (1929); *Cummings* v. *Chicago*, 188 U.S. 410 (1903).

Viewed from the perspective of the prevailing legal context, Congress' response to the *Willamette* case is unambiguous. As this Court explained in *United States* v. *Republic Steel Corp.*, *supra*, 362 U.S. at 492:

> The void which was left by *Willamette Iron Bridge Co.* v. *Hatch*, *supra*, need not be filled by detailed codes which provide for every contingency. Congress has legislated and made its purpose clear; it has

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[12] Though an admiralty case, *Piscataqua* has been recognized as one of the leading decisions permitting a private right of action for persons injured by unlawful obstructions. *See* Smith, *Private Action for Obstruction to Public Right of Passage*, 15 COLUM. L. REV. 1, 145 (1915). *See also* Kirwin v. Mexican Petroleum Co., 267 F. 460, 462 (D.R.I. 1920).

> provided enough federal law in § 10 from which appropriate remedies may be fashioned even though they rest on inferences. Otherwise we impute to Congress a futility inconsistent with the great design of this legislation.

Congress' willingness to fashion rights and remedies that "rest on inferences" undoubtedly complicates this Court's role of discerning legislative intent, but it does not justify frustrating that intent. It is as much "judicial legislation" to deny a private right of action which Congress intended as to improvise one that Congress never had in mind.

3. *The Legislative History Confirms that Congress Intended to Augment, Not Supplant, the Right of Enforcement by Private Citizens Which It Assumed Would Be Implied Under the Prevailing Common Law Doctrine.*

Congress included a provision for federal enforcement in order to ensure that the Act would in fact be enforced. Contrary to the suggestion of the Federal Respondents, the concern was not that private plaintiffs would complicate or impede enforcement. Rather the congressional debates evidence a fear that there would not be enough "public-spirited" plaintiffs like Hatch to enforce compliance.

This concern was specifically addressed by Senator Vest of Missouri, Chairman of the Subcommittee on Bridges of the Commerce Committee. Noting that "hundreds of bridges are constructed yearly in the United States, without any permission from Congress, over navigable streams under the jurisdiction of the Government," the Senator expressed doubt that private citizens had the financial resources to provide *all* of the enforcement needed. 21 CONG. REC. 8603 (1890). The Senator warned that if the Secretary of War were not given the power to enforce the Act, the only means to remove an obstruction would be for private individuals to initiate judicial proceedings "to condemn the bridge as a nuisance." *Id.*

The overriding legislative concern was that the Act be effectively enforced. Congress responded to this concern by enlisting the *additional* enforcement resources of the Department of Justice, not by eliminating the private enforcement resources which already existed.[13]

B. Private Rights of Action Are Essential to the Effective Enforcement of the Act.

Where, as here, a private right of action is essential to the accomplishment of the legislative purpose, "the Court is decidedly receptive to its implication under the statute." *Cannon* v. *University of Chicago*, *supra*, 441 U.S. at 703.[14] This rule provides strong support for the private right asserted here, for "[t]he inadequacy of the criminal penalties explicitly provided by § 16 of the Rivers and Harbors Act is beyond dispute." *Wyandotte Transp. Co.* v. *United States*, *supra*, 389 U.S. at 202.

1. *A Private Right of Action Is the Only Effective Check on Federal Violations of the Act.*

It is uncontested that the 1899 Act applies to federal agencies. The Act is unqualified in scope, and both the Corps of Engineers and Congress have recognized that federal projects are subject to the Act. *See* 33 C.F.R. § 322.3(1); *The Nation's Estuaries: San Francisco Bay and Delta, Calif. (Part 1): Hearings Before the House Comm. on Gov't. Operations*, 91st Cong., 1st Sess. 125 (1969).

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[13] Federal Respondents suggest that the elimination from one of the early bills of a provision which would have permitted private enforcement of penal sanctions, evidences an intent to vest exclusive enforcement in the Department of Justice. However, private enforcement of penal provisions, or *qui tam* actions, and private civil causes of action are two wholly separate issues and there is nothing in the legislative history which suggest that by eliminating the former, Congress meant *sub silentio* to affect the latter. *See* Sierra Club v. Andrus, 610 F.2d 581, 588 n.9 (9th Cir. 1979).

[14] *Accord*, Allen v. State Bd. of Elections, *supra*, 393 U.S. at 556; Wyandotte Transp. Co. v. United States, *supra*, 389 U.S. at 202.

In 1890, the federal government was itself a major builder of obstructions in navigable waterways. *See Water Pollution Control Legislation—1971 (Oversight of Existing Program): Hearings Before House Comm. on Public Works*, 92nd Cong. 1st Sess. 286 (1971). Although much of the building was done by the Corps, significant amounts were done by other government agencies. *See, e.g.*, Act of June 10, 1872, Ch. 415, 73 Stat. 347, 368. Today, federal involvement in the building of obstructions has reached enormous proportions. *See The Nations Estuaries: San Francisco Bay and Delta, Calif. (Part 2): Hearings Before the House Comm. Gov't Operations*, 91st Cong., 1st Sess. 17, 18, 24 (1969) (listing the numerous federal agencies which engage in projects affecting navigable waters).

As the legislative history demonstrates, the Act was designed to insure that *all* projects affecting navigable waterways would be subject to review by one knowledgeable decisionmaker applying a uniform federal policy. *See, e.g.*, 21 CONG. REC. 8602-03 (1890) (remarks of Sen. Gray). This objective requires effective enforcement of the Act against *all* violators, including federal violators. Congress could not have expected the Department of Justice conscientiously to pursue enforcement actions against federal agencies where the Department must also defend those agencies once prosecution is brought. *See Illinois ex rel. Scott* v. *Hoffman*, 425 F. Supp. 71, 76 (S.D. Ill. 1977) (United States Attorney represents the defendant and "is thus in no position to enforce the Act"); *Miller* v. *Mallery*, 410 F. Supp. 1283, 1289 (D. Or. 1976) (where government is both enforcer and alleged violator of an act, rejection of implied private action would eviscerate the act); *Natural Resources Defense Council, Inc.* v. *Grant*, 355 F. Supp. 280, 290 (E.D.N.C. 1973) (Attorney General represents agency and is thus in no position to enforce the act). Unless private plaintiffs are permitted to enforce this Act against federal violators, there will be no enforcement

against an entire group of violators and the goal of achieving a uniform federal policy will be substantially undercut.

2. *The Federal Government Has Proven Unwilling or Unable to Provide the Level of Enforcement Necessary to Implement the Congressional Intent.*

As this case demonstrates, the federal government has proved either unwilling or unable to meet its enforcement obligations under the Act. The water project at issue here constitutes one of the largest diversions of a major waterway in the history of the country. Yet, thirteen years after the Delta pumping plant was constructed, the Department of Justice has taken no action to demand the permit application it now admits is required.

Recent testimony before Congress by Justice Department officials suggests that failure to enforce the Act may be the rule rather than the exception. In response to repeated criticism by Congress of the lack of vigorous enforcement, *see* HOUSE COMM. ON GOV'T. OPERATIONS, INCREASING PROTECTION FOR OUR WATERS, WETLANDS AND SHORELINES: THE CORPS OF ENGINEERS, H. R. REP. 1323, 92nd Cong., 2d Sess. 23-26 (1972); HOUSE COMM. ON GOV'T OPERATIONS, ENFORCEMENT OF THE REFUSE ACT OF 1899, H. R. REP. 1333, 92nd Cong., 2d Sess. 6-22 (1972), Justice Department officials frankly acknowledged that they lacked adequate resources to fully enforce the Act. *See id.* at 16.[15]

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[15] This lack of resources is particularly critical here since the only effective enforcement is *prompt* enforcement. Once substantial work on the project has occurred, it may be economically infeasible to order total restoration. *See, e.g.*, United States v. Sexton Cove Estates, Inc., 526 F.2d 1293 (5th Cir. 1976); United States v. Sunset Cove, Inc., 514 F.2d 1089 (9th Cir.) *cert. denied*, 423 U.S. 865 (1975). Moreover, as an Assistant Secretary of the Interior has explained, it is extremely difficult to evaluate completed work because "the work accomplished often has already destroyed any values which we seek to preserve." H.R. REP. No. 1323, 92d Cong., 2d Sess. 22 (1972). Finally, the further a project has progressed,

Senator Vest may have been correct that private resources alone are not sufficient to guarantee full and expeditious compliance with the Act. 21 CONG. REC. 8603 (1890). But, as this case demonstrates, actions by private parties constitute an effective means of blocking some of the most egregious violations of the statute. Given the reality of non-enforcement by the government and the overriding congressional intent to ensure compliance, the conclusion must be that private plaintiffs can sue to enforce this Act.

3. *A Private Right of Action Will Not Circumvent The Intended Agency Review, But Will Ensure that the Intended Agency Review Will Occur.*

Congress established the Corps as a licensing agency in order to ensure a consistent federal policy made by one body with technical expertise. The Corps was selected because it "controls all the means of informing itself about the physical conditions that surround the proposed structure and has at its command every avenue of information that will throw light upon the question which is to be decided." 21 CONG. REC. 8604 (1890) (remarks of Sen. Gray). The permit process augments this expertise by providing an opportunity for public hearings and comment, *see* 33 C.F.R. § 327.1-327.11, as well as procedures for ensuring the input of other federal agencies with expertise. *See e.g.*, Memorandum of Understanding Between the Secretary of the Interior and the Secretary of the Army, *reprinted in* 33 C.F.R. § 322 Appendix B at 693.

These carefully designed procedures simply never occurred in this case. In discussing before Congress the very water diversion project which is at issue here, the

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the more likely it is that innocent third parties will have purchased property and will be damaged if restoration is required. *See Section 404 of the Federal Water Pollution Control Act Amendments of 1972: Hearings Before Senate Comm. on Pub. Works*, 94th Cong., 2d Sess. 113-114 (1976).

Corps conceded that the decision not to require a permit was not based on any independent Corps analysis of the project, but on representations made by the Bureau of Reclamation, one of the potential violators of the Act. *See The Nation's Estuaries: San Francisco Bay and Delta, Calif. (Part 1): Hearings Before House Comm. on Government Operations*, 91st Cong., 1st Sess. 101 (1969). The Corps' acquiescence had the same practical effect as granting an unlimited permit; but, unlike the permit process, this "decision" was made without opportunity for public comment, without input from other agencies, and without an environmental impact statement.[16] The result is that either the Corps or the Justice Department or both have, through a cursory, informal, non-public, non-reviewable process, issued a permit by simply taking no action. As one Congressman aptly described the Corps' handling of the water diversion project at issue here: "there is no way of knowing whether it [the Corps' enforcement decision] has been done arbitrarily or capriciously in any instance because nobody has ever sought a permit, nobody has ever examined what is being done." *Id.* at 103.

A private right of action in this case will not circumvent the intended agency review, but rather will ensure that the intended agency review occurs. Thus, unlike *Securities Investor Protection Corp.* v. *Barbour*, 421 U.S. 412 (1975) and *National R.R. Passenger Corp.* v. *National Ass'n of R.R. Passengers*, 414 U.S. 953 (1974), a private right here is entirely consistent with the legislative scheme. *See Cort* v. *Ash*, *supra*, 422 U.S. at 78.

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[16] The critical importance of these procedures in the environmental enforcement scheme distinguishes the 1899 Act from those securities statutes which this Court has held do not include an implied right of action. *See* Transamerica Mortgage Advisors, Inc. v. Lewis, *supra*; Touche Ross & Co. v. Redington, *supra*; Piper v. Chris-Craft Indus., Inc., 430 U.S. 1 (1977). For example, the National Environmental Policy Act of 1969 specifically recognizes the importance of the participation of "private organizations," 42 U.S.C. § 4331(a), and mandates that all federal laws be interpreted in accordance with the policies of that Act. *Id.* at § 4332(1).

In sum, both Congress and the courts understood the 1899 Act as an effort to fill "the void which was left by *Willamette Iron Bridge Co.* v. *Hatch.*" *United States* v. *Republic Steel Corp., supra,* 326 U.S. at 492. This Court should not reopen that void by denying the limited private right of action sustained below. As the private action is essential to effectuating the legislative intent, denying the right would "impute to Congress a futility inconsistent with the grand design of this legislation." *Id.*

II. THE CIRCUIT COURT CORRECTLY HELD THAT THE CORPS' JURISDICTION UNDER SECTION 10 OF THE RIVERS AND HARBORS ACT OF 1899 EXTENDS TO ALL ACTIVITIES WHICH MODIFY OR ALTER THE CONDITION OR CAPACITY OF A NAVIGABLE STREAM.

The second issue presented in this case is whether in the 1899 Act Congress exercised its admitted authority over navigable waterways to require a Corps permit for massive water diversions caused by a state-authorized facility.[17] This Court should reject petitioners' plea that a broad exemption for state projects be read into the 1899 Act which was intended by Congress to assure federal protection over all navigable waters no matter what the source of the threat to the nation's waterways. The Circuit Court properly found that the massive diversions of water caused by the Delta pumping plant which have lowered water levels and caused reversals in directional flow in the Delta, constitute an alteration or modification of the condition or capacity of a navigable waterway

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[17] It is not disputed that Congress has the constitutional *power* to regulate state water allocation projects which affect navigable waters. The obvious existence of that power is conceded by petitioners. California Brief at 13; Water Agency Brief at 37. This Court has previously found that navigable waters are properly subject to national planning and control pursuant to the broad federal commerce power and that this control extends to a broad range of federal interests in addition to navigation. United States v. Appalachian Elec. Power Co., 311 U.S. 377, 426-427 (1940).

which require a Corps permit under clause three of Section 10 of the 1899 Act.

A. The Plain Words of Section 10 Require Corps Approval of the Delta Pumping Plant.

Section 10 of the 1899 Act consists of three separate clauses. The first clause prohibits the creation of an "unreasonable" obstruction to the navigable capacity of a federal waterway unless affirmatively authorized by Congress. *Wisconsin* v. *Illinois*, *supra*, 278 U.S. at 412-413. The second and third clauses prohibit certain enumerated structures and activities in navigable waters which Congress determined posed a sufficient threat to the nation's waterways so that prior federal approval would be required. Thus, as the Circuit Court below held:

> When one undertakes any of the activities described in clause 2 or by his activities brings about any of the results specified in clause 3, he violates section 10 if he has not first sought and obtained a permit from the Corps of Engineers.

610 F.2d at 595.

Clause three provides in relevant part:

> [I]t shall not be lawful . . . in *any* manner to alter or modify the course, location, condition, or capacity . . . of the channel of any navigable water of the United States, unless the work has been recommended by the Chief of Engineers and authorized by the Secretary of the Army prior to beginning the same.

33 U.S.C. § 403 (emphasis added). The Circuit Court correctly applied this statute to the Delta pumping facility since by its terms clause three applies without regard to the identity of the party creating the alteration or modification. 610 F.2d at 599. While inviting this Court to read a special exemption for state water projects into the 1899 Act, petitioners impliedly concede, as they must, that the 1899 Act itself nowhere exempts state water projects from the broad jurisdiction given the

Corps over the nation's waterways. California Brief at 41. Moreover, petitioners do not and cannot contend that the literal terms of Section 10 are ambiguous.[18] In these circumstances, this Court should not read an exemption for state water projects into the clear language of Section 10. *Corona Coal Co.* v. *United States*, 263 U.S. 537, 540 (1924). *See also Tennessee Valley Auth.* v. *Hill*, 437 U.S. 153, 184 n.29 (1978).

B. The Legislative History of the 1899 Act Demonstrates that Section 10 Applies to the Delta Pumping Plant.

While this Court need not look beyond the plain words of Section 10, should it do so the legislative history of the 1890 and 1899 Acts confirms that Congress did not contemplate the exemption of state water projects suggested by petitioners. In fact, there are repeated references in the debates preceding passage of the 1890 Act to the applicability of Section 10 to state-authorized projects. *See, e.g.*, 21 CONG. REC. 8604 (1890) (remarks of Sen. Gray). There is not a single reference in the legislative history of Section 10 to a special exemption for state water projects. Rather, the legislative history of the 1890 and 1899 Acts shows clearly that Congress determined that centralized control and protection of the national waterways was properly a federal concern, and that the Corps, by virtue of its demonstrated expertise respecting navigable waters, was the appropriate guardian of these precious national resources. *Id.* at 8602-04.

Petitioners' exemption theory also ignores the history of Section 10 and the language of Section 9, 33 U.S.C.

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[18] This Court has recently noted that broad general language is not ambiguous where the congressional objectives to be served require broad terms. Diamond v. Chakrabarty, 100 S. Ct. 2204, 2211 (1980). In § 10, Congress set forth the types of effects on navigable waterways it intended to regulate in broad terms which are both understandable and necessary since Congress in 1899 was in no position to enumerate in detail the infinite variety of structures or activities that could adversely affect the nation's waterways.

§ 401. Under Section 10 of the 1890 Act, the federal government could not remove an existing obstruction to navigation if it had been affirmatively authorized by a state legislature. *See United States* v. *Bellingham Bay Boom Co.*, 176 U.S. 211, 214-215 (1900). Section 10 of the 1890 Act allowing obstructions to navigation "affirmatively authorized by law" was changed by Congress in Section 10 of the 1899 Act, however, to require affirmative authorization "by Congress." Congress' decision in 1899 to reserve to itself this power to exempt certain projects from federal review shows plainly that the Delta plant is not exempt from Corps review merely because it is part of a larger project approved by the California legislature. *See Wisconsin* v. *Illinois*, *supra*, 278 U.S. at 412.

Section 9 of the 1899 Act, enacted simultaneously with Section 10, generally prohibits the erection of bridges or dams across navigable waterways without congressional approval. As to navigable rivers that lie wholly within a single state, however, erection of such structures can be authorized by the state legislature without the approval of Congress, but only if the location and plans for the structure are submitted to and approved by the Corps before construction begins. Thus, even this express recognition of state authority over navigable but intrastate waters in the 1899 Act was qualified by Congress' desire that ultimate responsibility for the protection of all navigable waters reside with the Corps.

Having found no support for their exemption theory in either the language or legislative history of the 1899 Act, petitioners rely almost entirely upon a supposed congressional "policy," as expressed in 38 different statutes, of deference to state water rights law. In these 38 statutes, however, Congress deferred to state law in explicit terms, while in the 1899 Rivers and Harbors Act Congress did not do so, but instead expressly asserted the supreme authority of Congress and the Corps over all activities affecting the nation's waterways, as shown *supra*.

Moreover, this Court should not conclude that an express congressional policy of deference to state law in one context carries an implication of a similar intent in a vastly different context. *See Moragne* v. *States Marine Lines, Inc.*, 398 U.S. 375, 402-403 n.16 (1970). In Section 10 of the 1899 Act the United States is acting as a sovereign in exercising its broad authority over all national waterways. By contrast, the 38 statutes cited by petitioners deal primarily with situations in which the United States is a *local user* of water within a state's boundaries for purposes of land management or reclamation. These 38 statutes merely allow state officials to allocate scarce water resources among various users on an equitable basis under state law, unhindered by federal claims of a superior entitlement to the water supplies by virtue of the United States' sovereignty. Thus, Congress' deference to state water rights law in these 38 statutes is no basis for reading a broad exemption for state water projects into the 1899 Act where the United States is not acting as a local water user,[19] but rather as a sovereign [20] in protecting the nation's waterways from

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[19] Even the cases relied on by petitioners support this distinction between the Corps' role as protector of the nation's waterways and the role of other federal agencies as users of water. In California v. United States, 438 U.S. 645 (1978), for example, § 8 of the Reclamation Act of 1902, 43 U.S.C. §§ 372, 383, was held to require that the U.S. Bureau of Reclamation seek a permit from the California State Water Resources Control Board prior to impounding 2.4 million acre-feet of water for a federal reclamation project, in part because the legislative history of the Reclamation Act of 1902 equated the rights of the United States as an owner of public lands with those of an individual, both of which were subordinate to the sovereignty of the state. 438 U.S. at 670 n.23. The effect of § 8 of the Reclamation Act of 1902 and similar deferrals to state law found in the other statutes cited by petitioners was to relegate the federal government to the status of a private landowner—a position clearly distinguishable from the unquestioned supremacy of the United States' authority through the Corps over navigable waters.

[20] *See* Sanitary Dist. of Chicago v. United States, 266 U.S. 405, 425-426 (1925).

all parties including states who, by virtue of their superior economic resources, are uniquely capable of undertaking activities on a large enough scale to affect federal concerns significantly.

C. The Circuit Court Opinion Is Supported by the Decisions of This Court Construing the 1899 Rivers and Harbors Act.

This Court has long recognized, contrary to the assertions of petitioners, that state water projects are subject to the prohibitions of Section 10. *United States* v. *Rio Grande Dam & Irrigation Co.*, 174 U.S. 690 (1899). In *Rio Grande* a water diversion authorized by New Mexico was found to require federal approval since the power of a state to allocate the waters of a stream within its boundaries was subject to the superior power of the federal government under Section 10 of the 1890 Act "to take all needed measures to preserve the navigability of the navigable water courses of the country . . . ." 174 U.S. at 703. This Court pointed out that after the 1890 Act: "it is obvious that Congress meant that . . . no State should interfere with the navigability of a stream without the condition of national assent." *Id.* at 708. Even the appropriation of the waters of a non-navigable stream "by the State of New York for domestic uses" would run afoul of the statute, this Court noted, if that appropriation impaired the navigability of a navigable stream. *Id.* at 709. This contemporaneous explication of Congress' intent to apply Section 10 of the 1890 Act to state water projects strongly supports the Circuit Court's holding, and should be afforded great weight in assessing Congress' intentions when it reenacted Section 10 of the 1890 Act in clause one of Section 10 of the 1899 Act.

In *Sanitary District of Chicago* v. *United States*, 266 U.S. 405 (1925), this Court, in requiring a Corps permit for a state water project, again contrasted the superior federal power to protect the nation's waterways, as exercised in the 1899 Act, with the subordinate authority of the states to allocate those waters to their own uses:

> This is not a controversy between equals. The United States is asserting its sovereign power to regulate commerce and to control the navigable waters within its jurisdiction.
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> * * * *
>
> The main ground is the authority of the United States to remove obstructions to interstate and foreign commerce. There is no question that this power is superior to that of the States to provide for the welfare or necessities of their inhabitants.

266 U.S. at 425-426. *Accord, Wisconsin* v. *Illinois, supra.*

In none of the cases cited above did this Court even intimate that state water allocation projects were exempt from the provisions of Section 10, but instead in each case this Court applied Section 10 to state-authorized allocations of water serving admittedly important state interests. The petitioners cite no judicial authority under Section 10 which contradicts this unbroken line of cases recognizing federal jurisdiction over state projects.

D. The Circuit Court's Interpretation of Section 10 Effectuates Congress' Intention that All Activities Affecting Federal Interests in the Nation's Waterways Be Subject to Federal Control.

The Corps is charged in Section 10 with the responsibility of determining whether proposed structures or activities enumerated in the second and third clauses of that section impact adversely on federal interests to such an extent that a federal permit should be denied. When, as here, the proposed activity falls within the terms of clause three and federal jurisdiction attaches, the Corps is obligated to balance any potentially adverse effects on national interests against the benefits expected from the proposed project. 33 C.F.R. § 320.4(a)(1). In the case of a state water project, if the permit is granted and the project goes forward, then the state—and not the Corps—retains control to distribute approved volumes of water among competing interests in such proportions as state authorities deem advisable. Thus, through Section 10 and

the Corps permitting authority, Congress has created a system whereby the states are free to manage the distribution and use of their internal waters once it is shown that national interests of overriding importance will not be impaired.

Contrary to petitioners' exaggerated claims of undue federal interference in state matters, the so-called "veto power" of the Corps over state water projects under Section 10 arises only if the Corps properly determines that proposed diversions of water over which it has jurisdiction *unreasonably* interfere with the various federal interests the Corps is charged by Congress to protect. Such permitting decisions by the Corps are subject to judicial review, and may be set aside pursuant to 5 U.S.C. § 706(2)(A) if found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *See Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402 (1971); *DiVosta Rentals, Inc.* v. *Lee*, 488 F.2d 674, 678 (5th Cir. 1973), *cert. denied*, 416 U.S. 984 (1974). Thus, petitioners' arguments about the critical importance of water allocations in the arid West do not bear on the Corps' jurisdiction over state water diversion projects, but are relevant instead to whether the benefits of these projects tip the scale decidedly in favor of approval of the permit application.[21] While petitioners would have this Court strike that balance irrevocably in favor of state projects, the Circuit Court's decision upholding federal jurisdiction over the Delta pumping plant commits the initial evaluation of those factors to the appropriate forum—the Corps. *See* 21 CONG. REC. 8602-04 (1890). Any permit decision by the Corps with which petitioners disagree is subject to judicial review.

California's alternate theory that Corps approval of state water projects is required only if they create a sub-

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[21] In this respect, the Corps' regulations acknowledge the substantial public benefits ordinarily attaching to projects that have received the approval of responsible state authorities. *See* 33 C.F.R. § 320.4(j)(4).

stantial interference with actual navigation again confuses the jurisdictional question of whether a Corps permit must be sought with the substantive question of whether a permit should be issued. If there is some threshold level of state-initiated navigational interference below which federal approval is unnecessary, California's theory offers no clue as to how or by whom it is to be determined whether that threshold has been crossed in a particular case. Adoption of this theory would also eliminate any exercise of discretion by the Corps, for any state water diversion project that required Corps approval would by definition involve a substantial interference with navigation and be deniable on that basis alone. Thus, the only state projects to which the Corps should give its approval would be those over which it has no jurisdiction, and the only state projects over which it would have jurisdiction would be those it should not approve. Congress could hardly have intended such a self-defeating means of protecting the nation's waterways.

The Delta plant's pumping operations at issue here in fact affect the "navigable capacity" of the Sacramento-San Joaquin Delta as California now concedes, California Brief at 53, the District Court found, and the Circuit Court determined, citing the "convincing factual evidence" relied on by the District Court. 610 F.2d at 594. The Circuit Court properly held, however, that clause three of Section 10 applies to all activities which alter or modify a navigable waterway whether or not the activity adversely affects navigation or navigable capacity. This Court need not review this aspect of the Ninth Circuit's opinion in order to affirm the judgment below since petitioners acknowledge that the Delta plant has some impact on the Delta's navigable capacity. Petitioners mistakenly argue, however, that evidence of a significant impact on navigation is a prerequisite to the Corps' jurisdiction under clause three of Section 10. If it addresses this issue, this Court should reject this contention because it

is inconsistent with the plain language of clause three and the prior decisions of this Court.

In *United States* v. *Republic Steel Corp.*, *supra*, this Court examined the broad reach of Section 10 and the independence of its three clauses and observed that some structures to which clause two applies "may only deter movements in commerce, falling short of adversely affecting navigable capacity" within the meaning of the first clause. 362 U.S. at 486-487. It follows inescapably that the proscribed alterations or modifications of the third clause are equally independent of the requirement of clause one that navigable capacity be impaired. In fact in *Sanitary District of Chicago* v. *United States*, *supra*, this Court held Corps approval to be a prerequisite to diversions of water from Lake Michigan without making or relying upon a factual determination as to the effects of the diversions on navigable capacity. 266 U.S. at 426, 429. *See also Wisconsin* v. *Illinois*, *supra*, 278 U.S. at 413 ("the broad words of the first clause [of Section 10] ... were not intended to limit the second and third clauses").[22]

The lowering of Delta water levels here, like the lowering of navigable waters in *Sanitary District*, altered or modified the condition and capacity of a navigable waterway and therefore required prior Corps approval regardless of the effect on the Delta's navigable capacity. In clause three Congress declared that all modifications or

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[22] Petitioners mistakenly argue that this Court's decision in United States v. Rio Grande Dam & Irrigation Co., *supra*, requires a contrary reading of clause three of § 10. *Rio Grande* involved injunctive proceedings brought by the Attorney General under what is now clause one of § 10. The issuance of injunctive relief *under that clause* was limited to appropriations of water which "substantially interfer[e]" with navigable capacity. 174 U.S. at 709. The Corps' jurisdiction under clauses two and three is not subject to a similar limitation, however, as those clauses are directed at federal concerns extending well beyond navigation.

alterations to our nation's waterways [23] present a potential danger to the various national interests Congress sought to protect in Section 10 [24] and hence require a Corps permit whether or not they happen to threaten nagivation in particular.[25] Congress did not envision, as petitioners would suggest, that the Corps' jurisdiction would hinge on a two-step analysis, determining first

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[23] Of course, § 10 must be read as incorporating a *de minimus* standard. Indeed, the Corps' regulations provide that certain activities having only the slightest effects on navigable waters do not require permits. *See* 33 C.F.R. § 322.4. Obviously, however, the lowered water levels and flow reversals caused by the Delta plant's massive pumping operations do not fall within such a *de minimus* rule.

[24] In addition to such historic federal concerns as navigation and flood control, Congress in recent years has expressly required that the Corps consider environmental interests as well in making permit decisions under § 10. *See, e.g.*, National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321-4347; Fish and Wildlife Coordination Act, 16 U.S.C. §§ 661-666(c). In fact, environmental interests are to be given equal weight with other federal concerns. *See* S. REP. No. 1981, 85th Cong., 2d Sess., *reprinted in* [1958] U.S. CODE CONG. & ADMIN. NEWS 3446, 3450. *See also* National Environmental Policy Act of 1969, § 102(1), 42 U.S.C. § 4332(1). Thus, in making a permit decision under § 10 the Corps must evaluate the impact of the proposed project on: "conservation, economics, aesthetics, general environmental concerns, historic values, fish and wildlife values, flood damage prevention, land use, navigation, recreation, water supply, water quality, energy needs, safety, food production, and, in general, the needs and welfare of the people." 33 C.F.R. § 320.4(a)(1). *See also* 33 C.F.R. § 322.5(g)(1).

[25] California's reliance on Maine Water Co. v. Knickerbocker Steam Towage Co., 99 Me. 473, 59 A. 953 (1905), in this regard is misplaced. California Brief at 54-57. That case held that clauses two and three of § 10 qualify the first clause only in the sense that obstructions to navigable capacity which receive Corps approval can be erected without meeting the additional precondition of congressional authorization. The Maine court's holding and this Court's adoption of it in Wisconsin v. Illinois, *supra*, 278 U.S. at 412-413, do not limit the operation of clauses two and three to the "obstructions" prohibited by the first clause.

whether a proposed alteration or modification would create an obstruction, and only then whether the obstruction would be unreasonable.

Lower federal courts have correctly held that Section 10 requires a Corps permit for alterations or modifications of navigable waters adversely affecting the environment, and have approved the rejection of permit applications by the Corps on strictly environmental grounds.[26] As the Circuit Court noted, 610 F.2d at 597 n.25, it need not be decided in this case whether the significant environmental effects of the Delta plant's operation alone trigger the need for a permit under Section 10 since the reduced water levels and flow reversals created by the Delta pumping plant do impact adversely on navigable capacity. Nevertheless, the Fifth Circuit decisions noted above and the Corps' duty as mandated by Congress to protect the environment in and around our nation's navigable waters illustrate why Section 10 should be applied literally to projects, like the Delta pumping plant, which may adversely affect federal environmental interests even more than they adversely affect federal navigation interests. If Section 10 were construed otherwise, as petitioners urge,[27] the Corps

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[26] *See, e.g.*, United States v. Joseph G. Moretti, Inc., 526 F.2d 1306, 1310 (5th Cir. 1976); United States v. Sexton Cove Estates, Inc., *supra*, 526 F.2d at 1298-99; Weiszmann v. District Engineer, U.S. Army Corps of Engineers, 526 F.2d 1302, 1304-05 (5th Cir. 1976); Zabel v. Tabb, 430 F.2d 199, 203-204 (5th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971).

[27] The tortured definition of the "condition or capacity of the *channel*" of navigable water offered by the Water Agencies, Water Agency Brief at 41, defies both reason and common sense. In their view, a three-foot reduction in the depth of a stream is prohibited by § 10 if it is caused by elevating the bed of the stream, but is not prohibited if caused by the removal of some of the stream's water even though both activities obviously affect the condition and capacity of a navigable waterway in a similar way.

might well find itself powerless to prevent a state water project which had disastrous environmental consequences from the federal point of view, but which had only marginal effects on navigation.

CONCLUSION

For all of the foregoing reasons, the judgment and opinion of the Circuit Court should be affirmed.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF CALIFORNIA, et al.,
Petitioners,

v.

SIERRA CLUB, et al.,
Respondents,

and

KERN COUNTY WATER AGENCY, et al.,
Petitioners,

v.

SIERRA CLUB, et al.,
Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF AMICI CURIAE OF PUBLIC WATER AGENCIES IN SUPPORT OF RESPONDENTS SIERRA CLUB, ET AL.

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QUESTIONS PRESENTED

1. Whether the Rivers and Harbors Act of 1899 includes an implied right of action enabling private parties to seek civil enforcement of Section 10 of the Act.

2. Whether Section 10 of the Rivers and Harbors Act of 1899 applies to a water export project that diverts water from a navigable waterway and the diversions thereby diminish the navigable capacity of the channel or where the diversion alters or modifies the course, location, condition or capacity of the channel.

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Now come Contra Costa County Water Agency, San Joaquin County Flood Control and Water Conservation District, Central Delta Water Agency and South Delta Water Agency, public water agencies created under the laws of the State of California,

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(collectively referred to herein as "*Amici*") and they hereby respectfully move for leave to file the attached brief *amici curiae* in this case. The consent of the attorneys for the respondent Sierra Club, et al., has been obtained. The consent of the Solicitor General of the United States has been obtained (on behalf of the federal respondents). The consent of the attorneys for the petitioner State of California was sought and consent was refused. The consent of the attorney for the petitioner Tulare Lake Basin Water Storage District has been obtained. The consent of the attorneys for petitioners Kern County Water Agency, Metropolitan Water District of Southern California and the Santa Clara Valley Water District was sought and consent was refused.

The interest of these *Amici* arises from the fact that each are public water agencies situated in the Sacramento-San Jaoquin Delta (in the counties of Contra Costa and San Joaquin). One of the principal purposes of these *Amici* is to do everything possible to preserve and protect the water resources in the Delta and all of the beneficial uses of the water therein. The issues in the instant proceedings involving the matter of diversions of water out of the Delta by the State and federal water export projects (State Water Project and federal Central Valley Project) directly affect the interests of these *Amici* (and the lands and water rights encompassed thereby).

Amici are presently parties to eleven (11) lawsuits pending in the State and federal courts of California. The lawsuits involve, both directly and indirectly, the operations of the State and federal water projects. One of said lawsuits is the case of *U.S. v. California* which was recently remanded by this Honorable Court to the U.S. District Court after this Court's decision in *California v. U.S.*, 438 U.S. 645 (1978). The holding in and scope of that decision are critical in the evaluation of the position and arguments raised by petitioners herein. *Amici* disagree with said position of petitioners herein principally based upon said decision in *California v. U.S.* For this additional reason, *Amici* are vitally interested in the legal issues raised in said proceedin[illegible].

Petitioners have taken the position that the State of California should exercise complete control of the navigable waterways in the Delta. They argue that where water diversions authorized under California law are involved, no permit from the Corps of Engineers under Sections 9 and 10 of the Rivers and Harbors Act of 1899 is necessary. We disagree. We desire to present to the Court some legal and factual considerations not presented by other parties in the instant proceedings in and by the attached brief of *Amici Curiae*.

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BRIEF AMICI CURIAE OF PUBLIC WATER AGENCIES IN SUPPORT OF RESPONDENTS SIERRA CLUB, ET AL.

SUMMARY OF ARGUMENT

These *Amici Curiae* (each of which is a public water agency created by a separate statute enacted by the California Legislature), with the principal purpose of preserving and protecting the many thousands of vested water rights in and the irreplaceable water resources (i.e., waters used for domestic,

agricultural, industrial and environmental uses) of the great and vast Sacramento-San Joaquin Delta from being degraded and lost by the intrusion (by daily tidal action) of ruinous salt water from San Francisco Bay and the Pacific Ocean, contend herein:

I

There can be no serious dispute as to the full jurisdiction of the Army Corps of Engineers over the many navigable waterways (i.e., in excess of 550 miles) in the Delta and of any diversion of water therefrom by the State Water Project (SWP) by its Delta Pumping Plant in the southeastern corner of the Delta which water is thus exported to the Southern San Joaquin Valley and to Southern California.

II

The *State's* plea herein that it be allowed to control and regulate all such "export diversions" without any interference by or from the Corps of Engineers is fundamentally fallacious and unsound because it is based upon case authorities not in point and which are clearly distinguishable. This is particularly true of its principal reliance upon the recent decisions of this Court in *California v. U.S.*, 438 U.S. 645 (1978) and *U.S. v. New Mexico*, 438 U.S. 696 (1978).

III

These "export diversions" presently cause and will continue to cause drastic reductions in Delta Outflows (i.e., flows of fresh river water from the Sacramento and San Joaquin Rivers into and through the Delta and the lower (westerly) portion of the Bay-Delta Estuarine System), with a consequent severe and destructive intrusion of salt water into the Delta. These Delta Outflows are the only feasible means of repelling and controlling the ever present daily menace of such destructive saline intrusions.

IV

The *State* and its Department of Water Resources (DWR) have a basic conflict of interest vis-a-vis the Delta in connection with its said "export diversions" because, on the one hand, the

State is obligated under the *Delta Protection Act* (Water Code Sections 12200-12205) to provide ample Delta Outflows to adequately repulse and control said salinity intrusions while, on the other hand, to export to the South as much water as it can in an attempt to fulfill its water contracts with these Southern interests and its rich and powerful allies in this litigation (e.g., Metropolitan Water District of Southern California, Kern County Water Agency, et al). Because of this basic conflict, these *Amici* and the thousands of landowners and water users they represent urgently need the aid and protection which the Corps of Engineers can provide pursuant to its admitted jurisdiction herein over the Bay-Delta Estuarine System.

V

It is misleading, if not improper, to describe or characterize the Corps' actions taken under the Rivers and Harbors Act as an attempt to "allocate" water between water right owners (as the *State* attempts to do herein). The Corps, in processing an application for a permit under Sections 9 and 10, only determines what activities in navigable waters must be prohibited or limited in order to protect the paramount federal interest in the condition and quality of navigable waterways.

VI

The salinity intrusions into the Delta caused by these huge water diversions of the SWP constitute "pollution" under federal law (i.e., Clean Water Act, 33 U.S.C. §§ 1251-1376).

VII

The Peripheral Canal Project (proposed to be constructed by the *State* for its SWP) will admittedly cause a closure, modification or temporary modification of navigable water channels in the Delta which is another basis for Corps jurisdiction over the "export diversions" of the *State* and its SWP.

The scope and full significance of these contentions of *Amici* thus summarily stated will become more apparent from the following Statement of Facts which *Amici* will now present.

STATEMENT OF FACTS OF INSTANT CASE AND INTEREST OF AMICI CURIAE HEREIN

The legal issues on this appeal are of great importance to the preservation and protection of San Francisco Bay and the Sacramento-San Joaquin Delta upstream therefrom (hereinafter: Bay-Delta Estuarine System).[1] All of the multitude of important water rights, water needs and beneficial uses of water within the Bay-Delta Estuarine System (e.g., domestic, industrial, agricultural, recreational and environmental uses and needs) will be impacted by the decision herein. To understand the significance of this case and the interest of these *Amici* herein, we shall briefly set forth several salient facts.

The Bay-Delta Estuarine System[2]

One physical component of this System is San Francisco Bay. The Bay comprises the largest estuary along the 1,000-mile coastline of California. More than 4,000,000 people reside in the metropolitan San Francisco Bay Area. Many of them use the water of the Bay for recreation, commerce and aesthetic enjoyment.[3]

Moving to the north and east of San Francisco Bay into San Pablo and Suisun Bays, the next principal component is the nationally recognized Suisun Marsh Wildlife Habitat. This 85,000 acre brackish water marsh represents about 13 per cent of the natural wetlands in California. The Marsh supports over 200

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[1]The parties stipulated to "undisputed facts" below which are contained in the *"Agreed Pre-Trial Order Respecting The First Phase Of Bifurcated Trial"* (dated June 10, 1974). Said "Pre-Trial Order" is set forth in the Joint Appendix filed herein by the parties. In paragraph 3.54 of said "Pre-Trial Order," the parties agreed that: "San Francisco Bay and the Delta are estuaries." (p. 97a)

[2]Some of these salient facts as to this Estuarine System are set forth in *Bulletin 76* of the State Department of Water Resources (July, 1978), an official governmental publication of the State of California. *State* has asked this Court to take judicial notice of this publication (*State Br., p. 4, fn. 2*) and a certified copy thereof has been lodged with the Clerk of this Court.

[3]See paragraph 3.20 of "Pre-Trial Order" (Joint Appendix, p. 89a).

species of birds, 36 species of mammals and 7 species of rare or endangered wildlife, as well as providing important nursery areas for striped bass and other fishes. It is a major wintering area for ducks and geese of the Pacific Flyway.

The third principal component of this Estuarine System is the Sacramento-San Joaquin Delta (hereinafter: Delta). The Delta is situated in the counties of Contra Costa, San Joaquin, Sacramento, Yolo, Solano and Alameda. It is an area of over 700,000 acres; including over a half million acres of rich farmlands which annually produce crops in excess of $300 Million. It is the site of many substantial industries (e.g., Crown-Zellerbach, Fibreboard Corporation (Louisiana Pacific), U.S. Steel, Dow Chemical) which are dependent upon adequate fresh water supplies out of the Delta's maze of river channels. The Delta is one of the most important wildlife areas of California.[4] The 700 miles of river channels in the Delta, with a navigable length in excess of 550 miles, supports vast anadromous fisheries (e.g., striped bass, salmon, steelhead, shad, sturgeon)[5] as well as other fisheries.

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[4]*Bulletin 76 (1978)* describes the importance of the Delta as a wildlife area as follows:

> "The Delta is one of the important wildlife areas of the State. Species are numerous and include ducks, geese, swans, sandhill cranes, pheasants, over 200 different species of non-game birds, 39 species of mammals, 19 species of reptiles, and eight species of amphibians. Corn and other grains left after harvesting supply millions of waterfowl with high-quality feed each winter." (p. 47.)

[5]Paragraph 3.18 of the aforementioned "Pre-Trial Order" set forth in the Joint Appendix states:

> "3.18 The Sacramento-San Joaquin Delta contains approximately 700 miles of meandering waterways some of which are navigable. Approximately 35% of California warm water and anadramous sport fishing and about 80% of the commercial salmon fishing of California are dependent upon the Delta environment. As used herein, the Sacramento-San Joaquin River Delta ('Delta') shall include all lands within those boundaries set forth in California Water Code § 12220 and depicted on State Defendants' Exhibit A." (p. 89a)

Need for "Salinity Control" in The Estuarine System

The many beneficial uses of water, both consumptive and non-consumptive, in the Bay-Delta Estuarine System are constantly being threatened by the excessive intrusion into this Estuarine System of saline water from the Pacific Ocean (due to daily tidal action). Such excessive salinity intrusion poses a real and constant threat to the survival of the Suisun Marsh. It also degrades and pollutes water quality in the Delta with serious economic impacts on agriculture and industry as well as cause public health problems in connection with the domestic use of water in the Delta.[6]

The only feasible means of controlling such excessive salinity intrusions is to repulse them by continuously maintaining adequate flows of fresh river water in the channels of the Delta which flow through the Delta and into the rest of this Estuarine System. The water flows thus provide a "hydraulic barrier" to provide "Salinity Control." Such required water flows are commonly referred to as "Delta Outflows." Such Delta Outflows can be provided by natural river runoff and by the release of waters impounded upstream of the Delta by the dams and reser-

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[6]This salinity intrusion problem is emphasized by *State* in its *State Br.* as follows:

> "A major problem of California's water supply system is that the Delta's waters are perennially threatened by the intrusion of ocean salt waters. *The intruding salt waters pose a threat to valuable economic and environmental interests in the Delta; the Delta sustains a rich agricultural economy, and is the source of unusual species of fish and waterfowl.* The intruding salt waters also threaten to degrade the quality of SWP and CVP waters exported from the Delta to the contracting water districts in central and southern California." (emphasis added) (p. 5)

voirs of the State Water Project (SWP) and the federal Central Valley Project (CVP).[7]

The Delta "Export Projects"

The federal Central Valley Project is one of two "export projects" operating in and diverting water out of the channels of the Delta. Its pumping plant, called the Tracy Pumping Plant, is

[7] *State* describes the "Salinity Control" functions of the SWP and CVP in its *State Br.* as follows:

> "An effective way to prevent such salinity intrusion is to flush out the salt waters by release of vast quantities of fresh waters from the upstream dams and reservoirs of the SWP and CVP. The more water that is used for flushing purposes, however, the less water is available for export to the contracting water districts." (p.5)

This is but one aspect of the "conflict of interest" between the *State* (as the operator of the SWP) and the water rights and water users in the Delta and other portions of this vast Estuarine System. (See page 14, *infra*)

Incidentally, this Court epitomized the purposes of the CVP (including the provision of Salinity Control in the Delta) in *Ivanhoe Irrigation District v. McCracken,* 357 US 275, 2 Led 2d 1313 (1958) as follows:

> ". . .The water supply facilities along the Sacramento River will regulate its flow, store surplus water runoff for use in the Sacramento Valley, maintain navigation in the channel, *protect the Sacramento-San Joaquin Delta from salt intrusion from the Pacific,* provide a water supply for the Contra Costa and Delta-Mendota Canals, and generate a great deal of hydroelectric energy. . ." (emphasis added) (357 US at 282; 2 Led 2d at 1320)

This Court then explained the nonreimbursable features of the CVP as follows:

> ". . .Moreover, the Federal Government will receive no reimbursement for that portion of the cost allocated to numerous aspects of the project, such as navigation, flood control, salinity prevention, fish and wild life preservation, and recreation. The irrigators will, therefore, be chargeable with but a small fraction of the total cost of the project. . ." (357 US at 283; 2 Led 2d at 1321)

situated in the southeastern corner of the Delta. The pumping plant is capable of diverting water at the rate of 4600 cubic feet per second. The water thus diverted is "exported" to its water contractors (primarily agricultural) in the southern portions of the San Joaquin Valley of California.

The other "export project" is the State Water Project. Its Delta Pumping Plant is also situated in the southeastern corner of the Delta. This pumping plant is presently capable of diverting water at the rate of 6300 cubic feet per second. The SWP intends to attempt to ultimately export and deliver 4.23 million acre feet of water out of the Delta to its water contractors (e.g., Kern County Water Agency, Metropolitan Water District of Southern California, Santa Clara Valley Water District, Tulare Lake Basin Water Storage District, petitioners herein).

Ultimately, both the SWP and CVP intend to attempt to divert and export at least 7.75 million acre feet of fresh water out of the Delta.[8] This is approximately 44 per cent of the present average annual Delta Outflow in a normal water year of 17.8 million acre feet.

In order to "capture" this enormous quantity of water and divert it out of the Delta (while ensuring the quality of such water for its water customers), the State of California proposes to construct the Peripheral Canal.

The Peripheral Canal Project

This would be a mammoth conduit of some 42 miles in length that would have its intake situated on the Sacramento River near the community of Hood. The Canal would divert 21,800 cubic feet per second of good quality water and convey it around the eastern edge of the Delta, thus isolating the water from the natural channels of the Delta. It would be so large (200 feet wide at the bottom, 400-500 feet wide at the top and 20-30

[8]See paragraph 3.57 of the "Pre-Trial Order" at p.98a of Joint Appendix.

feet deep) that it would be capable of diverting 70 to 80 per cent of the Sacramento River flows in a normal water year.[9]

The prime purpose of the Peripheral Canal is to enable the SWP to intercept and thus "grab" large additional amounts of excellent quality water which now flows into and through the Delta to provide the requisite "Salinity Control" needed for the protection of the multitude of beneficial water uses in this Estuarine System (particularly the uses within the Delta). As the District Court below found and concluded, such diversions would have a substantial impact on navigable capacity of the Sacramento River.[10]

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[9]These and other physical features and dimensions of the proposed Peripheral Canal are set forth in *Bulletin 76* (*1978*) at pp.85-89 thereof.

It should also be noted that the District Court below found that the Peripheral Canal would divert as much as 80% of the flow in the Sacramento River, viz: ". . . If constructed, the Peripheral Canal will divert waters from the Sacramento River near Hood, California. The rate of flow of water in the Sacramento River at that location varies between 10,000 cfs and 100,000 cfs. Donn J. Stafford, a civil engineer with the Department of Water Resources, testified that at various times during the year the Canal would divert significantly more than 50% of the Sacramento River flow and at times could divert as much as 80% of that flow." (400 F Supp at 632)

To understand the significant impact that diversions of 80% of Sacramento River flows would have upon the Delta, it should be noted that the Sacramento River supplies about 75% of the water flowing into the Delta. The San Joaquin River supplies only 10% of water into the Delta primarily because of the diversion and storage of its flows behind Friant Dam (at its headwaters). The result of the impoundment of San Joaquin River flows has been the degradation of water quality and diminished river flows in the Southern Delta.

[10]The District Court found:

> "With respect to the proposed operation of the Peripheral Canal, the evidence established that there would be significant effects on the velocity and water level of the Sacramento River." (400 F Supp at 632)

The District Court then concluded:

> ". . . The Court further concludes that as presently proposed, the Peripheral Canal will also result in an obstruc-

Salient Facts Re These Amici Curiae

Each of these *Amici* is a public water agency created by a special statute enacted by the California Legislature.[11] These public water agencies together with the San Francisco Bay Conservation and Development Commission [12] encompass practically all of the Bay-Delta Estuarine System.

One of the principal purposes of these *Amici* is that of preserving and protecting the water resources of the Delta and the quality thereof for the multitude of beneficial uses of water therein.

It should also be noted that the prevention of "salinity intrusion" is specifically authorized by statutes creating these public water agencies.[13]

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tion to navigable capacity of the Sacramento River." (400 F Supp at 632).

[11]Contra Costa County Water Agency was created by the "*Contra Costa County Water Agency Act*" in 1957 (*Stats. 1957, Chapter 518*).
San Joaquin County Flood Control and Water Conservation District was created by the "*San Joaquin County Flood Control and Water Conservation District Act*" in 1956 (*Stats. 1956, Chapter 46*).
Central Delta Water Agency was created by the "*Central Delta Water Agency Act*" in 1973 (*Stats. 1973, Chapter 1133.*)
South Delta Water Agency was created by the "*South Delta Water Agency Act*" in 1973 (*Stats. 1973, Chapter 1089.*)

[12]This Commission was created in 1965 to prepare a plan to protect and preserve the water resources and shoreline of San Francisco Bay. After the Commission submitted its plan to the Governor and to the Legislature in 1969, this 27 member Commission then became a permanent body to protect the Bay.

[13]For example, the "*Contra Costa County Water Agency Act*" provides in part:

> "§11. *Additional powers.* The agency may do any and every act necessary to be done so that sufficient water may be available for any present or future beneficial use or uses of the lands or inhabitants of the agency, including without limiting the generality of the foregoing, irrigation, domestic, fire protection, municipal, commercial, industrial and recreational uses. Without limiting the

Delta Protection Act (DPA)

Recognizing the vital importance of preserving and protecting this invaluable Delta and its manifold beneficial uses, the California Legislature enacted in 1959 a statute called the *"Delta Protection Act" (Stats. 1959, Chapter 1766)* (California Water Code Sections 12200 - 12205). The Legislature found that special legislation for the Delta was necessary because of the unique water problems therein; especially the problem of salinity intrusion.

Section 12202 of the DPA expressly obligates the SWP to provide "salinity control and an adequate water supply for the users of water in the Sacramento-San Joaquin Delta."

Section 12203 declares that no person or entity, private or public, "should divert water from the channels of the Sacramento – San Joaquin Delta to which the users within said Delta are entitled."

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generality of the foregoing or any other section of this act, the agency has the following additional powers:

* * *

(2) To develop, protect, conserve and reclaim waters, reduce the waste of water, *control and prevent the intrusion of salinity in water,* replenish underground water supplies and reclaim flood and storm waters, within the agency." (emphasis added in part)

Section 4.1 of the *"Central Delta Water Agency Act"* states its general purposes as follows:

"*§4.1. General purposes of agency*

The general purposes of the agency shall be to negotiate, enter into, execute, amend, administer, perform, and enforce one or more agreements with the United States and with the State of California, or with either, which have for their general purposes the following:

(a) *To protect the water supply of the lands within the agency against intrusion of ocean salinity*; and

(b) To assure the lands within the agency a dependable supply of water of suitable quality sufficient to meet present and future needs." (emphasis added in part.)

State Water Resources Control Board (SWRCB) and Its D-1485

The SWRCB is a political organization. Its five members are appointed by the Governor (Water Code Section 175). It does not have adjudicatory powers. Its function in connection with the processing of water appropriation applications is that of determining whether or not there is available "unappropriated water."[14]

Notwithstanding the aforementioned explicit mandate of the DPA, *State* (and its SWRCB) have promulgated wholly inadequate water quality standards for the alleged protection of the Delta in its Decision D-1485. *State* has touted D-1485 herein as a "landmark administrative decision." (*State Br., p. 6*) Said Decision D-1485 (and the companion documents submitted to this Court by *State*) show that the SWRCB slashed water quality standards in "dry" and "critical" years (when the need for Salinity Control is the greatest).[15] The significance of thus reducing

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[14]The functions of the SWRCB in a water appropriation proceeding are succinctly stated by the U.S. District Court in *Santa Margarita Mutual Water Company v. State Water Rights Board,* (D.C. - S.D. - Cal.) (1958) 165 F Supp 980, as follows:

> "However tried, the issues to be determined by the state agencies, are:
>
> (1) *was there available in the stream unappropriated water?*
>
> (2) what was the priority of the various applications?
>
> (3) which application should be granted and which denied?
>
> (4) to whom should permits issue?
>
> (5) *All this to be done without prejudice to existing vested rights, riparian,prescriptive, appropriative or otherwise.*" (emphasis added) (165 F Supp at 873)
>
> *Also:*
>
> "Thus, the state proceedings will concern solely the *appropriative claims to alleged excess water over and above vested rights.*" (165 F Supp at 879) (emphasis is Court's)

[15]See Decision D-1485, pages 37-39.

water quality standards in the Delta is that more water can thus be exported from the Delta by the SWP.[16]

As a result of the SWRCB's refusal to comply with the DPA in connection with its administrative decision in D-1485, these *Amici* had to and did file appropriate litigation in the State courts. These *Amici* are plaintiffs in 6 lawsuits (in the Superior Court of the City and County of San Francisco) which seek to annual and vitiate said D-1485.[17]

Water Right Status of State in Connection with the State Water Project

We desire to emphasize three things on this subject.

The first is that the *State* (and its Department of Water Resources - DWR) does not have any paramount or superior water right as the basis for the SWP and its "export" of water from the Delta. To the contrary, the *State* is merely a *junior appropriator*. Its water rights (through its water appropriation permits obtained from the SWRCB) are entirely subservient to the myriad of prior and superior water rights (e.g., riparian,

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[16]*State* explains this result as follows:

> "Under this decision, the SWP and CVP can export waters from the Delta to the extent these conditions are met." (*State Br.*, p. 6)

In other words, any water flow in excess of that needed to maintain a given water quality standard is thus subject to diversion and export.

[17]These lawsuits are the so-called *Delta Water Cases,* Judicial Council Coordination Proceeding No. 548 mentioned in the *State Br.* at p. 7. These lawsuits and their case numbers as filed are entitled: *"San Joaquin County Flood Control and Water Conservation District, Central Delta Water Agency, et al. v. SWRCB* (No. 743342, San Francisco); *South Delta Water Agency, et al. v. SWRCB* (No. 743341, San Francisco); *Contra Costa County Water Agency v. SWRCB* (No. 743385, San Francisco); *South Delta Water Agency, et al. v. SWRCB,* (No. 193342, Contra Costa); *San Joaquin County Flood Control and Water Conservation District, Central Delta Water Agency, et al. v. SWRCB* (No. 193377, Contra Costa) and *Contra Costa County Water Agency, et al. v. SWRCB* (No. 193298, Contra Costa).

prior appropriative, etc) in the Bay-Delta Estuarine System. In short, the *State* is supposed to only divert from the Delta *truly surplus water*. (Calif. Water Code Section 1202)

The second point is that the water contracts between the *State* and its water contractors (e.g., Kern County Water Agency, Metropolitan Water District of Southern California, et al) only obligate the *State* to deliver water to them if, as and when *surplus water* is available to the State for such deliveries. We stress this "surplus water phase" because it is easy to gain the impression from the briefs of the *State* and its rich and powerful allies (the petitioners Kern County Water Agency and Metropolitan Water District, et al herein) that these water contractors have a fixed and legal right to receive at all times the amounts of water specified in the SWP contracts. This is not so.[18]

The third and most important aspect of this water right situation is that the *State* (DWR) *has a direct "conflict of interest"* vis-a-vis the Delta and its superior water rights. Why? Because as a junior appropriator (and as the operator of the SWP) the *State* is desirous of exporting as much water from the Delta as possible for delivery to its customers under the SWP contracts. An axiom of water law is that there is always a direct "conflict of interest" between a junior appropriator and a senior water right owner unless there is a clear, binding and readily enforceable "diversion schedule" binding upon both of them. No such adjudicated schedule exists in this Delta situation.

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[18]These facts as to the SWP contracts are contained in *Bulletin 141* published by the *State* and entitled: "The California State Water Project - Water Supply Contracts" (November 1965). It should be mentioned that each SWP contract is virtually identical as to its terms because certain "Standard Provisions for Water Supply Contract" were approved by Governor Brown on August 3, 1962 which established the basis for these SWP contracts. We adopt the procedure of the *State* herein in asking this Court to take judicial notice of this official governmental publication. One two-volume set is being lodged with the Clerk of this Court.

This basic conflict is expressly confirmed by the following cryptic statement in the *State Br.:*

> "The more water that is used for flushing purposes, however, the less water is available for export to the contracting water districts. A conflict thus exists between Delta water needs and the water needs of users in central and southern California." (p. 5)

It should be emphasized at this juncture that one of the principal duties of the *State* (DWR) and the function of its SWP is that of providing adequate Salinity Control in and for the Delta and to provide an adequate water supply for the users therein (pursuant to the mandates of the *Delta Protection Act*) (p.11, *supra*).

We respectfully submit that these facts above as to the Delta's unique situation demonstrate the wisdom of not permitting the *State* to take control of the navigable waterways in the Delta.

ARGUMENT

I-THE ARMY CORPS OF ENGINEERS HAS FULL JURISDICTION UNDER THE RIVERS AND HARBORS ACT OF 1899 OVER SAID "EXPORT DIVERSIONS" (SWP)

A. Settled Legal Principles

The Commerce clause of the U.S. Constitution, Article I, Section 8, Clause 3, grants to the federal government broad powers to regulate all activities affecting interstate commerce in navigable waters. This power to regulate commerce necessarily includes the power over navigation. [*Gibbons v. Ogden,* 22 US (9 Wheat) 1, 6 L Ed 23 (1824)] Thus the federal government has the duty of protecting navigable waters as the public property of the nation. [*Wyandotte Transportation Co. v. U.S.,* 389 US 191, 201, 19 Led 2d 407 (1967); *Gilman v. Philadelphia,* 70 US (3 Wall) 713, 724-725, 18 L Ed 96 (1865)]. It is indisputable that the Rivers and Harbors Act is a proper exercise of power by the

Congress of the United States under its duty to protect the navigable waters of the United States.

It is also beyond cavil that the federal power to regulate interstate commerce and navigable waters extends beyond navigation per se, and may include consideration of social, economic, aesthetic and ecological factors. [*Kaiser Aetna v. U.S.* ____ US ____, 62 Led 2d 332, 100 S Ct 383 (1979); *U.S. v. Appalachian Electric Power Co.*, 311 U S 377, 85 Led 2d 243, 61 S Ct 291 (1940); *Zabel v. Tabb*, 430 F2d 199 (5th Cir. 1970)] In fact, *State* concedes that the Corps' authority under the Rivers and Harbors Act is very broad. (*State Br.*, pp. 45-47).

B. Application of Said Settled Principles to Instant Case

Two things should be emphasized in this connection.

The first is that the parties stipulated below that various natural channels in the Delta constitute "navigable waters of the United States within the meaning of the Rivers and Harbors Act of 1899."[19]

The second salient fact pertinent on this phase is that the parties also stipulated in and by the aforementioned "Pre-Trial

[19]Said "Pre-Trial Order" (in paragraph 3.42) states as follows:

> "3.42 For purposes of this action, it is stipulated that the following constitute navigable waters of the United States within the meaning of the Rivers and Harbors Act of 1899: the Sacramento River to River Mile 301.6, at Keswick Dam; the San Joaquin River to River Mile 118, at the confluence of the Merced and San Joaquin River; and the Sacramento-San Joaquin River Delta including but not limited to Old River, Middle River, Italian Slough, Whiskey Slough, Beaver Slough, Disappointment Slough, Fourteen Mile Slough, Victoria Canal, North Victoria Canal, North Canal and Woodwood Canal to the plane of the mean higher-high tide. For purposes of this lawsuit it is agreed that the portion of the Delta from which water is drawn by facilities of the Tracy Pumping Plant is a 'navigable river or other navigable water of the United States' within the meaning of section 9 of the Rivers and Harbors Act of 1899." (Joint Appendix, p. 96a)

Order" that the Peripheral Canal would result in the closure, modification or temporary modification of various Delta waterways.[20] We will deal with the Peripheral Canal more fully hereafter (p. 23, *infra*).

The third salient fact is that the District Court in its analysis of the need for a compliance by the *State* (DWR) with Section 10 of the Rivers and Harbors Act, found that the Peripheral Canal would result in the complete closure or substantial modification of various navigable channels in the Delta and also would have a substantial impact upon the velocities and water levels in these channels.[21]

What then is the position of the *State* with respect to the foregoing salient and undisputed facts which clearly confirm the jurisdiction of the Corps herein? This issue is framed (at p. 15 of the *State Br.*) as follows:

> "The primary question here is whether section 10 applies to water diversions authorized under the water rights laws of the western states."

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[20]Paragraph 3.55 of said "Pre-Trial Order" states:

> "3.55 The Peripheral Canal would result in the closure, modification or temporary modification of the following Delta channels: Sacramento River; Snodgrass Slough; Lost Slough; Mokelumne River; Beaver Slough and Beaver Canal; Hog Slough; Sycamore Slough and Sycamore Canal; White Slough and White Canal, and outlet into Disappointment Slough; Telephone Cut; Disappointment Slough, Fourteen Mile Slough and Fourteen Mile Canal; San Joaquin River; Whiskey Slough; Middle River Complex; Old River; and West Canal." (Joint Appendix, p. 97a)

[21]The District Court stated (in part):

> ". . . It also appeared that diversion would decrease the velocity and lower the water level of the Sacramento River downstream from the Peripheral Canal intake. Finally, the Canal would result in the closure or modification of a number of rivers and sloughs in the Delta including the complete damming of the Middle River. With respect to the Middle River closure, no provision has been made for the passage of boats past this point on the River." (400 F Supp at 632.)

The *State's* principal contention on this phase is, in essence, that the Rivers and Harbors Act should be construed as not applying to the aforementioned exports from the Delta by the SWP (and CVP) because of an alleged "historic congressional policy of deferring to state water rights laws governing water allocations in the western states" (*State Br.*, p. 14, et. seq.)

1. The Rivers and Harbors Act Does Not Exempt Water Export Projects (e.g., SWP and CVP) from the Corps' Permit Jurisdiction under Sections 9 and 10.

On its face, Section 9 of the Act does not contain any express exemption of water export projects from the scope of its applicability to activities in navigable waterways. On its face, Section 10 of the Act similarly does not contain any such express exemption of water export projects. Thus, the only way that *State* can evade the requirement of *applying for a permit under Sections 9 and 10 of the Act* is by demonstrating that Congress impliedly exempted the water export operations from the Act. No such implied Congressional exemption has been demonstrated in the brief of *State* or any other brief filed herein.

2. Neither *California* v. *US* nor *U.S.* v. *New Mexico* Support An Exemption Of Water Export Projects.

One of the principal authorities relied upon by *State* in support of its argument is *California v. United States,* 438 US 645 (1978). That decision of this Court does not support the *State's* position herein. That case is clearly distinguishable from the instant case, both factually and legally. In that case, this Court was called upon to interpret Section 8 of the federal Reclamation Act of 1902, which, in essence, required that the Secretary of Interior, in connection with reclamation projects constructed by the federal government, "shall proceed in conformity with state laws relating to the control, appropriation, use or distribution of water." This Court in that case decided (by a divided vote)

that under these provisions (of Section 8) the state water authority has the right and power, in considering and acting upon an application by the U.S. Bureau of Reclamation (now Water and Power Resources Service) to incorporate "terms and conditions" in any water permit granted by such state water authority to the federal agency.

The situation in the instant case is entirely different from that in *California v. United States.* We are dealing herein with *a federal statute* (Rivers and Harbors Act of 1899), which is conceded to be paramount to state law and which confers paramount jurisdiction on navigable waterways upon the Corps. There is no express deference to state water law in the Rivers and Harbors Act (as found by this Court in Section 8 of the Reclamation Act).

It should also be noted that this Court limited the right of the *State* to exclusively control its waters to situations where the reserved rights or navigation servitude of the United States are not invoked. This Court turned to its previous decisions in *United States v. Rio Grande Dam & Irrigation Co.,* 174 US 690 (1899) and stated as follows:

> "The Court noted that there are two limitations to the States' exclusive control of its streams—reserved rights 'so far as least as may be necessary for the beneficial uses of the government property,' 174 US, at 703, and the navigation servitude. The Court, however, was careful to emphasize with respect to these limitations on the States' power that, *except where the reserved rights or navigation servitude of the United States are invoked,* the State has total authority over its internal waters." (emphasis added.) (438 US at 662; 57 Led 2d at 1030)

Nor does this Court's decision in *United States v. New Mexico,* 438 US 696 (1978) aid *State* herein. That case involved the question of federal reserved rights to water in the Rio Mimbres River to preserve timber and provide water flows in the Gila National Forest. Speaking to the subject of when federal interest in

water defers to state water law, this Court clarified its holding in *California v. United States* by limiting such deference to state water law to situations where "Congress has expressly addressed the question of whether federal entities must abide by state water law."

This Court stated:

> *"Where Congress has expressly addressed the question* of whether federal entities must abide by state water law, it has almost invariably deferred to the state law. See California v. United States, ante, at 653-670, 678-679, 57 L Ed 2d 1018, 98 S Ct 2985. Where water is necessary to fulfill the very purposes for which a federal reservation was created, *it is reasonable to conclude, even in the face of Congress' express deference to state water law in other areas, that the United States intended to reserve the necessary water.* Where water is only valuable for a secondary use of the reservation, however, there arises the contrary inference that Congress intended, consistent with its other views, that the United States would acquire water in the same manner as any other public or private appropriator." (Emphasis added.) (438 US at 702; 57 L ed 2d at 1058.)

From the foregoing, it is obvious, we respectfully submit, that the "historic Congressional policy of deference to state water law" should be limited to statutes wherein Congress has expressly spoken in favor thereof. Congress declined to do so in the Rivers and Harbors Act of 1899. The *State's* position must be rejected.

3. The Corps Does Not Attempt To "Allocate" Water When Exercising Its Powers to Protect the Public Interest in the Condition and Quality of Navigable Waters

There are four points we desire to make on this phase.

The first point is that when the Corps exercises its powers and performs its duties under the Rivers and Harbors Act and concludes that the activities of an applicant for a permit injure navigable waterways, the Corps may deny the permit or grant a permit subject to terms, conditions and limitations. In doing so, the Corps is not attempting to "allocate" water between competing water right owners (e.g., between owners of senior and superior water rights in the Delta and the *State* (DWR) as a junior appropriator). The Corps thus acts only to carry out and implement the paramount federal interest in protecting navigable waters. Therefore, the actions of the Corps taken pursuant to such paramount powers should not and cannot properly be characterized as an attempt to adjudicate the water rights (or to "allocate water" in the water-right sense) between a senior and superior water right owner and an applicant for a junior water appropriation permit (as the *State* argues herein).

The second point is that if the Corps concludes, after processing an application for a permit to cover the "export diversions" of the SWP, that certain water flows are needed in the Delta to protect these navigable waters and that therefore the SWP cannot export such requisite water flows, the *State* (DWR) has no cause to complain. Why? Because such requisite flows would not constitute "surplus water" available for such "export diversions." This "surplus water" requirement (California Water Code Section 1202) should be kept uppermost in mind if the proceedings and actions of the Corps under the Rivers and Harbors Act can properly and fairly be characterized as a water-

right matter or proceeding (which *Amici* submit is an improper characterization of the Corps' role and powers exercised under said Act).

The third point is that, under the facts of this case, no application by the *State* under said Act for its SWP has been processed by the Corps. Thus, it is premature and wholly speculative to conclude that the Corps has failed or would fail to properly "allocate" the water flows of the Delta. In other words, there can be no Corps determination that the "export diversions" of the SWP must be stopped or restricted in order to protect the navigable waters of the Delta (and the rest of the Bay-Delta Estuarine System) until the *State* (DWR) complies with the Rivers and Harbors Act by filing its application for a permit under Sections 9 and 10.

The fourth point is that, under the facts of this case, the salinity intrusions into the Delta caused by the "export diversions" out of the Delta by the *State* (DWR) and its SWP (with the resultant degradation of water quality for all beneficial uses of water in the Delta) constitutes a species of "pollution" which is forbidden by the provisions of the federal Clean Water Act (33 USC Sections 1251, et seq.). This is confirmed by the terms of the Clean Water Act and the legislative history in connection therewith.[22]

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[22]Section 1362(19) of Title 33 of the U.S. Code defines "pollution" as follows:

> "19) the term 'pollution' means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water."

This definition of "pollution" was the specific subject of a dialogue between Senator Muskie and Senator Bayh (on October 4, 1972) on the floor of the United States Senate, viz:

> "MR. BAYH: Mr. President, I wish to direct a question to the distinguished Senator from Maine (MR. MUSKIE) concerning the definition of water pollution in section 502 of this bill. *As we are all aware, the problem of excessive, ocean-derived salt water intrusion is a matter of the most*

II-THE RULING OF THE DISTRICT COURT BELOW WITH RESPECT TO THE PERIPHERAL CANAL PROJECT SHOULD NOT BE DISTURBED NOR CLOUDED BY A DECISION HEREIN.

The District Court below [*Sierra Club v. Morton*, 400 F Supp 610, N.D.Cal. (1975)] found that construction of the

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serious concern as it affects the estuaries, tidal marshlands and other water bodies of our country.

Under section 208(b)(2)(I) of the bill, areawide waste treatment plans must contain a process to identify this salt water intrusion and procedures and methods to control such intrusion to the extent feasible.

My question to the distinguished Senator is whether such salt water intrusion is pollution within the definition contained in section 502 of the bill?

MR. MUSKIE: I am happy to reply to the Senator. Such salt water intrusion to which the Senator refers resulting from reduction of fresh water flows from any cause, including irrigation, obstruction, upstream storage, ground water extraction and diversions, is no less a problem in various areas of the country than many of the other serious pollutants which threaten our fresh water supplies. As was noted in the report of the Senate Committee on Public Works last October:

'*Salt water intrusion, no less than point sources of discharge, alters significantly the character of the water and the life system it supports. Salt water intrusion often devastates the commercial shellfish industry. It must be accounted for and controlled in any pollution control program.* It makes no sense to control salts associated with industrial or municipal point sources and allow, at the same time, similar effects to enter the fresh water as a result of intrusion of salt water. The bill requires identification of those causes and establishment of methods to control them so as to minimize the impact of salt water intrusion.'

That language is as valid today as it was last year. For that reason, in answer to the Senator's question, *I would state that it is the intent of the conferees and of the bill that such salt water intrusion is pollution as defined in section 502 of the bill.*" (emphasis added) (118 Congressional Record, p. 16894)

Peripheral Canal would result in the complete damming of Middle River which is a navigable waterway in the Delta. The Court found that the Peripheral Canal would be a "dike" within the meaning of Section 9. The Court concluded that Section 9 of the Rivers and Harbors Act applies to the Peripheral Canal Project and that an appropriate permit must be obtained before it is constructed. The Court stated:

> "With respect to the Peripheral Canal, it is clear that Section 9 authorization will be required before any party commences building the Canal as it is presently proposed. At the point where the Canal crosses the Middle River, the Canal will result in the complete damming of the river. Furthermore, there is presently no provision for the passage of boats past the Canal at this location. Such a closure of the Middle River will constitute the building of a "dike" within the meaning of Section 9." (400 F Supp 610 at 626.)

The District Court further found that the Peripheral Canal would have significant and substantial effects on the velocity and water level of the Sacramento River. It further found that the Canal would result in the closure or modification of a number of navigable channels in the Delta, including the damming of Middle River. (400 F Supp at 632)[23]

The District then concluded that Section 10 was also applicable to the Peripheral Canal Project, viz:

> "Accordingly, the Court concludes that the operation of the Tracy and Delta Plants presently obstructs the navigable capacity of various navigable waters in the

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[23]As hereinbefore noted, the parties herein stipulated in and by the "Pre-Trial Order" set forth in the Joint Appendix filed herein that Peripheral Canal would result in the closure, modification or temporary modification" of a number of Delta channels. (See paragraph 3.55 of "Pre-Trial Order" at page 97a of Joint Appendix).

> Delta. The Court further concludes that as presently proposed, the Peripheral Canal will also result in an obstruction to navigable capacity of the Sacramento River." (400 F Supp at 632)

On appeal to the Circuit Court, the Court of Appeals (in *Sierra Club v. Andrus,* 610 F2d 581 (9th Cir., 1979) reh. den. 1980) was not asked to review any of the District Court's findings with respect to the Peripheral Canal.[24] The Court of Appeals noted this in its opinion as follows:

> "Neither the federal nor the state parties challenge the District Court's ruling concerning the Peripheral Canal." (611 F2d at 585)

We also wish to note that petitioners Kern County Water Agency and Metropolitan Water District of Southern California, et al specifically stated in their Petition for Writ of Certiorari (at page 5) that the Peripheral Canal is not the subject of their Petition, viz:

> "The State of California is planning to modify its present Delta diversion operations by building a canal known as the Peripheral Canal. However, that facility is not the subject of this petition (App. pp.71, 72)."

Based upon the foregoing, it should be apparent that the subject of the Peripheral Canal is not before this Court. In other words, the applicability of Sections 9 and 10 to the Peripheral Canal Project is not an issue in these proceedings.

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[24]The District Court also noted in its opinion, in footnote 34 thereof, that there was a concession during the course of trial that Sections 9 and 10 apply to the Peripheral Canal Project, viz:

> "34. With respect to the Peripheral Canal, it is conceded that its construction will require authorization under Sections 9 and 10 of the Rivers and Harbors Act of 1899. For the reasons set forth herein, a permit under Section 10 will likewise be required for its operation." (400 F Supp at 633).

Amici would normally feel comfortable with the foregoing facts in this proceeding and rest upon our conclusion that the Peripheral Canal is not before this Court. However, we fear that the Court could lose sight of the facts herein as to the Peripheral Canal given the broad reach of the contentions and arguments made by *State* herein. *State* seeks to totally exempt all State operated water projects and state authorized water diversions from the scope of Sections 9 and 10. For example, *State* further argues (as its Point II) that:

> **"I. IN LIGHT OF THE HISTORIC CONGRESSIONAL POLICY OF DEFERRING TO STATE WATER RIGHTS LAWS GOVERNING WATER ALLOCATIONS IN THE WESTERN STATES, *SECTION 9 AND 10 OF THE RIVERS AND HARBORS ACT OF 1899 SHOULD BE CONSTRUED AS NOT AFFECTING SUCH ALLOCATIONS*, . . ."** (emphasis added) (*State Br.*, p. 14)

> **"II. THE RIVERS AND HARBORS ACT OF 1899 DOES NOT APPLY FULLY, IF AT ALL, TO DIVERSION WORKS OWNED AND OPERATED BY THE STATES."** (*State Br.*, p. 48)

In arguing these points, *State* does not exclude the Peripheral Canal from the broad scope of their arguments in these proceedings.

Amici respectfully request that if the Court concludes and decides there is merit in the *State's* position herein that appropriate language be incorporated in any such a decision so that the ruling of the District Court on the Peripheral Canal Project is not disturbed nor clouded thereby.[24]

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[25]In making this request, this Court should be aware that the California Legislature authorized the Peripheral Canal Project during this past year by its passage of Senate Bill 200. Governor Brown signed the bill in late July, 1980. Less than 90 days thereafter, petitions with the signatures of over 843,000 California voters were submitted to the Office of the Secretary of State which qualified a referendum

Before concluding. *Amici* wish to add that while we have confined our arguments herein to the question and issues involving the applicability of the Rivers and Harbors Act to the water diversion activities of the "Delta Export Projects", we support the Sierra Club on the other issue herein, to-wit: the existence of a private right of action to enforce the Rivers and Harbors Act. The brief of the Sierra Club masterfully details the applicable legislative and common law history on this subject of the existence of a private right of action. We adopt their brief on this subject.

CONCLUSION

The Court of Appeals was correct in its conclusion that a private right of action exists to enforce the Rivers and Harbors Act of 1899. It was also correct in concluding that said federal statute applies to and prohibits the unauthorized water diversion of the *State* and its SWP in this case. Accordingly, *Amici* urge the affirmance of the judgment of the Court of Appeals.

Dated: December 30, 1980

Respectfully submitted,

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measure on the ballot at the next General Election. This referendum will be voted upon by the People in 1982 unless the Governor calls a special election to be held at an earlier date.

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